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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT No. 8.

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED.

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

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IN THE

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CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT No. 8.

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED.

Appellees.

ON APPEAL FROM THE SUPREME COURT

JURISDICTIONAL STATEMENT

NATURE OF THE CASE

Appellants appeal, from the final judgment of the supreme court of the State of Wisconsin, affirming the judgment of the Dane County circuit court which affirmed an order of the Wisconsin Employment Relations Commission (hereinafter WERC). The final judgment was entered September 30, 1975. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

CITATION OF DECISIONS BELOW

The opinion of the Wisconsin supreme court (A.App. pp. 101-25) is reported officially at 69 Wis. 2d 200 and unofficially at 231 N.W. 2d 206 and 89 LRRM 2929. The decision of the Wisconsin Circuit Court on appellant's petition for review (A.App. pp. 126-31) is not reported. The findings of fact, conclusions of law, order and memorandum, accompanying findings of fact, conclusions of law and order of the WERC (A.App. pp. 132-67) are not officially reported.

JURISDICTION

This action was originally brought pursuant to Sec. 111.70 Wis. Stats. (1971) before the WERC.

The appellants sought review, and reversal of the WERC decision in the Dane County circuit court pursuant to Section 227.20 Wis. Stats. (1971). The appellants appealed the judgment of the circuit court affirming the decision of the WERC to the Wisconsin supreme court. The judgment of the Wisconsin supreme court was entered June 30, 1975. Appellant's motion for rehearing was denied September 30, 1975

A notice of appeal to the United States Supreme Court was filed December 5, 1975 with the Wisconsin supreme court.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Board of Education v. Allen* 392 U.S. 236 (1968); *Brewer v. Hoxie School District No 46* 238 F. (2d) 91 (8th Cir. 1956);

Akron Board of Education v. State Board 490 F. (2d) 1285 (6th Cir. 1974), *cert denied* 417 U.S. 932 (1974); *Board of Education v. York* 429 F. 2d 66 (10th Cir. 1970); *Smith v. Board of Education* 365 F. (2d) 770 (8th Cir. 1966); *Raley v. Ohio* 360 U.S. 423 (1958); *Napue v. Illinois* 360 U.S. 264 (1958); *Lathrop v. Dohonue* 367 US 820 (1960); *LaCrosse Telephone Corporation v. Wisconsin Board* 336 US 18 (1948); *Saltonstall v. Saltonstall* 276 US 260 (1927); *Barrows v. Jackson* 346 US 249 (1953); *Pickering v. Board of Education* 391 US 570 (1968); *Wood v. Strickland* 420 US 308 (1974).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The case involves Wisconsin Municipal Employment Relations Act, Section 111.70 (1) (2) (3) (4) and (6) Wis. Stats. (1971). The Act may be found in Volume 1 Wisconsin Statutes (1971) p. 2141-2147. The relevant Sections are set forth in the Appendix (A.App. pp. 170-78). The Constitutional provisions involved in this appeal are Article I Amendments to United States Constitution and Article XIV Section I Amendments to United States Constitution (A.App. p. 179).

QUESTION PRESENTED

Whether a state labor statute may constitutionally require that a duly elected Board of Education refuse to permit a teacher employee the opportunity to speak and present a petition to the Board on a matter subject to collective bargaining at a regular board meeting during the portion of the meeting devoted to public appearances.

STATEMENT OF THE CASE

Material Facts

On December 6, 1971 negotiations between Madison Board of Education and Madison Teachers Incorporated (hereinafter MTI) had reached an impasse following eleven months of bargaining. MTI was the recognized exclusive bargaining representative for the Madison district school teachers. The bargaining relationship between the Board and MTI is governed by the Wisconsin Municipal Employment Relations Act (Section 111.70 Wis. Stats. (1971)) which makes it a prohibited labor practice for a public employer to refuse to bargain collectively with the majority representative or to interfere with, restrain or coerce employees in their collective bargaining rights.

At its regular board meeting of December 6, 1971, during the portion of the meeting devoted to public appearances, the Board of Education permitted a number of individuals including a representative of MTI and a teacher employee, who was not a member of MTI, the opportunity to speak and present a petition. Albert Holmquist, the teacher employee, addressed the Board as follows:

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers, Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package."

He then read the petition:

> "To: Madison Board of Education, Madison, Teachers, Incorporated. We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers, Incorporated and the Madison Board of

Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal. 4) The results of this written ballot be made public."

He added:

> We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the "whole package" and therefore is not issue specific ... Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it.
>
> For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to this hour have signed the petition on the first day it was taken to their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation."

When he finished, the Board president asked whether he intended to communicate the petitions to the Board. Mr. Holmquist replied he did. There was no other exchange between Mr. Holmquist and any member of the Board.

After the public meeting ended, the Board went into closed session to prepare for a negotiation meeting scheduled for the next day. The Board adopted a resolution to accept the total package demanded by MTI but not including fair-share. MTI accepted the Board's offer at the next day's bargaining session, reaching tentative agreement.

MTI filed a complaint in January, 1972 with the WERC alleging that the Board had committed a prohibited labor practice when it listened to Holmquist at its public meeting. The WERC held that the activities of the Board at its public meeting constituted bargaining with other than the exclusive representative of the Teachers and ordered the Board to cease and desist from permitting teacher employees other than MTI representatives to appear and speak at meetings of the Board on matters subject to collective bargaining. The Dane County circuit court affirmed the WERC ruling. The Wisconsin supreme court affirmed the Dane County circuit court. Three Justices dissented. Appellants motion for rehearing was denied.

Stage and manner in which federal question was presented and decided below

Prior to hearing, appellants raised by motion the question of whether the Wisconsin labor laws if applied to these facts violated the First Amendment of the United States Constitution. The WERC considered and ruled on the constitutional issue (A-App.pp. 163-4).

Appellant challenged the constitutionality of the WERC's decision in the Dane County circuit court. The circuit court decided the issue (A-App. p. 129). The constitutional problem was presented to the Wisconsin supreme court. The court considered and decided the federal constitutional issue as follows:

> "To the extent that the WERC and Circuit Court decisions in this case infringe upon the freedom to speak and to petition the federal and state governments, they are within limits imposed on the restriction of those rights by United States Supreme Court decisions and the decisions of this court." (A.App. pp. 109-10).

THE QUESTION PRESENTED IS SUBSTANTIAL

A. *It is Clear This Case Falls Within the Court's Appeal Jurisdiction.*

In the case at bar the appellants drew into question the validity of a state statute and the state court held the statute valid (28 USC 1257 (2)). The appellants initially challenged the application of Section 111.70 (3) (a) 1 & 4 Wis. Stats. (1971) to the facts of this case as invalid on federal grounds before the WERC. The WERC held the statute applicable and valid against constitutional attack. (A.App. pp. 163-4).

The appellant then challenged the constitutionality of the decision of the WERC. (A.App. p. 129). This court has made it clear that the phrase "statute of any state" encompasses every legislative action to which a state gives the force of law including the orders of state commissions which passes legislative characteristics. *Lathrop v. Dohonue* 367 US 820 (1960). There can be no doubt that the WERC decision possesses legislative characteristics essential to appeal jurisdiction. The decision prescribes future action to be taken by the board of education and, for that matter, all other public bodies when their employees wish to speak or petition at regular public meetings. (A.App. pp. 140-1).

The Wisconsin supreme court affirmed the decision of the circuit court (A.App. pp. 109, 110). The court's holding clearly sustained the validity of a state statute in the face of federal objections. It follows that an appeal pursuant 28 USC 1257 (2) lies in this case.

The decision in this case is a final decision by the highest state court of Wisconsin. *LaCrosse Telephone Corporation v. Wisconsin Board* 336 US 18 (1948).

The Wisconsin supreme court held that a federal question was properly before it and proceeded to consider and dispose of the constitutional question (A.App.pp. 109-10) Therefore, any

deficiency in the particularity with which the federal issue was framed disappears. *Saltonstall v. Saltonstall*, 276 US 260 (1927). It also follows that the federal issue was properly raised.

> "There can be no question as to the proper presentation of a federal claim when the highest court passes on it." *Raley v. Ohio* 360 US 423 (1958).

The Wisconsin supreme court held that the board of education negotiated in derogation of the rights of the exclusive bargaining representative of the teachers when it permitted Mr. Holmquist to speak. Jurisdiction via appeal is not defeated even though this Court may be called upon to review these findings of fact. This Court has indicated it will review a state courts findings of fact where the federal right has been denied as the result of a finding shown by the record to be without evidence to support it or where the conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary in order to pass on the federal question to analyze the facts. In *Napue v. Illinois*, 360 US 264 (1958), this Court referred to the long course of judicial construction which establishes as a principle that the duty rests on this court to decide for itself facts or construction upon which federal constitutional issues rest.

The appellant has standing to raise the constitutional questions presented by the WERC decision and order. Although the right to speak and p tition are personal rights the school board has sufficient personal stake in the outcome to be given standing since the board is duty bound to respect the constitutional rights of the general public and its teacher employees. *Board of Education v. Allen*, 392 US 236 (1968), *Pickering v. Board of Education*, 391 US 563 (1968). Any failure of Board members to recognize this duty and respect those rights may result in personal liability. *Wood v. Strickland*, 420 US 308 (1974). Furthermore the existence of a constitutional duty also presupposes a correlative right in the person upon whom the duty is imposed to be free from direct interference with its performance. *Brewer v. Hoxie School District* 238 F (2d) 91 (8th

Cir. 1956), *Akron Board of Education v. State Board of Education of Ohio*, 490 F (2d) 1285 (6th Cir. 1974), cert denied 417 US 932 (1974), *Board of Education v. York*, 429 F (2d) 66 (10th Cir. 1970).

In addition the board of education is the appropriate party to raise the constitutional rights of its teacher employees. It has been said that in order to have standing to litigate a constitutional question one must be asserting the right on his own behalf. But this is only a "rule of practice" which may be outweighed by the need to protect fundamental rights; that need in turn will prompt courts on grounds of broad constitutional policy to proceed without blind adherence to technical rules of representation. *Barrows v. Jackson* 346 US 249 (1953) *Smith v. Board of Education* 365 F (2d) 770 (8th Cir. 1966 Blackum J).

B. The Question Presented by the Wisconsin Supreme Court Decision is Substantial because of its impact Upon the System of Free Expression which is the Essence of Our Democratic System of Government.

This case confronts the Court again with the duty our system places on the Court to say where an individual's freedom ends and the state's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great and indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and sanction not permitting dubious intrusions. *Thomas v. Collins* 323 US 516 (1945). The constitutional protections of speech and petition were fashioned to assure unfettered interchange of ideas *New York Times v. Sullivan* 376 US 254 (1964). Freedom of speech lies at the foundation of a free society. *Shelton v. Tucker* 364 US 479 (1960). It is the essence of self government. *Garrison v. Louisiana* 379

US 64 (1964). It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction particularly when the right is exercised in conjunction with peaceable assembly.

This court informed boards of education that their teacher employees possessed constitutional rights similar to general citizenry and reminded boards of their obligation to respect those rights in *Pickering v. Board of Education* 391 US 563 (1968).

> "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this court." *Pickering* 391 US at 568.
>
> "It cannot be gainsaid that the state has interests as an employer in regulating the speech of its employees that differs significantly from those it possesses in connection with regulation of the citizenry in general" *Pickering* 391 US at 568.

The Wisconsin Supreme Court failed to consider the *Pickering* decision.

Furthermore, this court recently indicated that board of education members who disregard the constitutional rights of individuals may be subject to personal liability. *Wood v. Strickland* 420 US 308 (1974). The Wisconsin supreme court failed to consider the dilemma posed for board members by its decision in light of this Court's holdings in *Pickering and Wood, supra.*

In the face of the conceded fundamental importance of free expression to our democratic society, the obligation of boards of education to respect those rights of its teacher employees, and the personal risk to board members who disregard such rights, the Wisconsin supreme court affirmed an order which requires

boards of education to refuse to permit certain teacher employees the opportunity to speak and petition at regular public meetings.

The order affirmed is further suspect since it is tantamount to a prior restraint on individual employee speech on matters subject to collective bargaining. This court has consistently ruled that any system of prior restraints against expression bears a heavy burden against its constitutional validity. *United States v. Washington Post Co.* 403 US 713 (1971). The essence of forbidden censorship is content control; any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open. *Police Dept. City of Chicago v. Mosley* 408 US 92 (1972).

This prior restraint is further complicated by the ill defined boundaries of the phrase "matters subject to collective bargaining" which prevents ready determination of legitimate from illegitimate speech or petitions. This court has insisted that statutes punishing the use of words must be carefully drawn or authoritatively construed to punish only unprotected speech and must not be susceptible of application to protected expression. *Gooding v. Wilson* 405 US 518 (1972).

C. *The Question posed by the Wisconsin Supreme Court Decision is also Substantial because the Court Misjudged the Scope of the Labor Relations Doctrine of Exclusivity as Announced by this Court in* Medo Photo Supply Corp. v. NLRB *321 US 378 (1944).*

The appellants have conceded that speech in the form of bargaining or negotiating for a labor agreement can be

constitutionally restricted to the exclusive representatives of a bargaining unit. The Wisconsin supreme court cites with approval, as establishing this principle the case of *Medo Photo Supply Corp. v. NLRB*, 321 US 378 (1944). However, the *Medo* case is of crucial importance also because the Court therein considers the type of employer activity which can properly be judged "negotiating" with other than the exclusive bargaining representative. In *Medo* the employer not only listened but conferred with dissident employees so as to arrive at a settlement on the matter of wages. The employer refused to negotiate with the exclusive representative of the employees on matters of wages, hours and working conditions. The *Medo* case stands for the proposition that negotiating with other than the exclusive representative involves more than an employer merely listening to dissident employees. Here the school board merely listened. It is a perversion of the principle of *Medo* to hold when an employer merely listens he is negotiating. The perversion of the *Medo* doctrine is more abhorrent when applied to a public body obligated to respect the constitutional rights of its employees and citizens in addition to following the dictates of the labor law.

D. *Review of the Decision is Essential Because it Affects future Activity of Every Public Body in Wisconsin.*

The impact of the decision of the Wisconsin supreme court is not limited to the City of Madison board of education. The legislative characteristics of the WERC order has impact on all 435 Wisconsin school boards, 90% of which have teacher employee organizations. Wisconsin also has 72 counties, 1270 towns, 389 villages and 186 cities all of which are also affected by this decision.

Justice Robert Hansen, in dissent, correctly sets forth the practical effect of this decision on the operation of these public bodies.

"... the difficulty of locating its (the department order) outer limits will have a chilling effect both on the right of teachers to speak and school boards to listen on topics arguably relatable to bargaining, but directly concerned with the well-being of school children and the community. The prudent school board would resolve doubts against the right of an individual teacher to speak on marginal or in-doubt topics, and that is what is meant by having a chilling effect. The writer would hold the order, in its scope and breadth, to have a constitutionally impermissible temperature-lowering effect on the exercise of First Amendment rights." (A.App. p. 123).

CONCLUSION

Probable jurisdiction of the appeal of the City of Madison Board of Education should be noted.

Respectfully submitted,

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APPENDIX

No. 410

AUGUST TERM, 1974

STATE OF WISCONSIN IN SUPREME COURT

CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8, et al.
Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent,

MADISON TEACHERS, INCORPORATED,
Intervenor Respondent.

APPEAL from a judgment of the circuit court for Dane County:

WILLIAM C. SACHTJEN, Circuit Judge. *Affirmed.*

DAY, J. The question on this appeal is, was it error for the circuit court to affirm the conclusion of the Wisconsin Employment Relations Commission that the school board committed a prohibited labor practice in that it "negotiated" or "bargained" with other than the exclusive bargaining representative of the teachers on matters subject to collective bargaining when it allowed a representative of a minority group of teachers to speak at a board meeting, listened to his statements and received the results of a petition circulated by that group — all concerning matters subject to collective bargaining — when this was done at a regular public meeting of the board?

The appellant City of Madison Joint School District No. 8, including the City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke (hereinafter "school district") operates the

school system of said municipalities; the appellant Board of Education of the district is an agent of the district and is charged with the possession, care, control and management of the property and affairs of the school district.

The respondent Wisconsin Employment Relations Commission (hereinafter "WERC") is an administrative body charged with the responsibility of administering statutory policy with respect to both public and private employees.

Madison Teachers, Incorporated (hereinafter "MTI"), intervenor respondent, is a labor organization which was, at the time of the events which give rise to this action, the exclusive majority collective bargaining representative of the teachers of the district.

The Board of Education (board) and MTI were, for the calendar year 1971, parties to a collective bargaining agreement covering wages, hours, and conditions of employment for all bargaining unit personnel, which included all teachers. The agreement terminated on December 31, 1971. Negotiations for a successor agreement began almost as soon as the previous one concluded. Thus, on January 25, 1971, MTI submitted a proposal for a new contract to take effect January 1, 1972. This proposal contained a "fair share" provision, a contractual requirement that all teachers, including those not then members, pay full union dues, *i.e.*, their "fair share" of the costs of collective bargaining.

Such a provision was proposed by MTI the previous year and was rejected by the board. This fair-share provision was discussed throughout the 1971 negotiations and at all times was opposed by the board. Initially, the board objected because such a provision was then illegal. There were frequent requests by the board for MTI to defer fair share for another year.

On November 11, 1971, legislation (ch. 124, Laws of 1971) became effective which allowed inclusion of a fair-share provision in municipal-employee collective-bargaining agreements. This is now codified as sec. 111.70 (1), Stats., and defined in sec. 111.70 (1) (h). Soon thereafter MTI submitted another fair-share proposal to conform to the new law; again it was rejected by the board.

The number of unresolved issues between the parties had been reduced to about 13 by November, 1971. Two of these were considered of overriding importance by both sides: (1) the fair-share provision, and (2) the provision for binding arbitration of non-renewal of teacher contracts and teacher dismissals. The board had opposed both of these issues throughout the negotiations. However, in late October or early November, the chairman of the board's negotiating team indicated, informally and unofficially, to the chairman of MTI's negotiating team that there was "no way" arbitration for dismissals and non-renewals would be accepted by the board, but there was a "distinct possibility" the fair-share provision could be accepted. He said two members of the board said they would approve fair share if MTI would withdraw its arbitration proposal.

On the other hand, at the WERC hearing in this case, the chairman of MTI's negotiating team testified that the union's bargaining strategy was to lead the board to believe that MTI's primary interest was in fair share when in fact it was in arbitration. If this strategem were successful, MTI could at some point offer to "sacrifice" fair share for arbitration and celebrate the result.

On November 14, 1971, Ralph Reed and Albert Holmquist, teachers employed by the district, neither of whom were members of MTI, sent a letter opposing the fair-share provision, which they considered a denial of freedom of choice, to all teachers employed by the district. The letter solicited responses

and 200 were received, the majority sympathetic to their position. A meeting of some of these teachers was scheduled for December 2, 1971. Fourteen teachers attended, half of whom were MTI members. They prepared a petition and formulated plans for circulating it in the schools on December 6, 1971. The petition supported a one-year deferral of consideration of fair share. It was intended to present the results of the petition to both MTI and the board at the board's regular public meeting on the evening of December 6, 1971. The petition was circulated in the schools, in non-working areas on non-working time, that day and a letter, also urging deferral of fair share, was distributed to the teachers of two schools through their school mailboxes. The principals of those two schools, agents of the board, knew of the latter activity.

By December 6, 1971, negotiations between the board and MTI had reached an impasse. For the board's regular public meeting that evening MTI had arranged to have pickets present and 300-400 teachers in attendance at the auditorium. MTI's representative John Mathews knew in advance that Messrs. Reed and Holmquist intended to present the results of their petition and speak to the board against fair share. He encountered Mr. Holmquist and Mr. Reed in the auditorium before the meeting was to begin and tried to talk them out of presenting the petition or speaking to the board.

Soon thereafter, Mr. Mathews met a member of the board, Mr. Yelinek, outside. He informed Mr. Yelinek of what Messrs. Reed and Holmquist intended to do that evening and also showed him underlined portions of the *Board of Sch. Directors of Milwaukee v. WERC* (1969), 42 Wis. 2d 637, 168 N.W. 2d 92. Mr. Yelinek responded that he "would take care of it."

Mr. Mathews met Messrs. Reed and Holmquist again, soon after talking with Mr. Yelinek. He again tried, unsuccessfully, to talk them out of presenting the petition and speaking to the

board, telling them that the negotiations were delicate and urging them to refrain "or we were going to lose the whole ball game."

At the board meeting, a portion of time was devoted to public appearances. Mr. Holmquist completed a registration form stating that he wished to speak during this period. He did not say on this form what he wished to speak about. Several individuals spoke during this time and then the president of MTI rose and spoke. At the conclusion of his remarks he presented to the board a statement signed by 1300 to 1400 teachers, declaring "We, the undersigned wish the parties to resume negotiations and reach agreement as quickly as possible."

Immediately following this speaker, Mr. Holmquist was allowed to speak. He said

> " 'My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers, Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package.' "

He then read the petition:

> " 'To: Madison Board of Education, Madison Teachers, Incorporated. We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers, Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair share proposal. 4) The results of this written ballot be made public.' "

He added:

> " 'We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the "whole package" and therefore is not issue specific ... Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it.
>
> For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the propsal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation.' "

When he finished, the board president asked Mr. Holmquist whether he intended to communicate the petitions to the board. Mr. Holmquist replied that he did; the petitions, however, were never presented to the board. There was no other exchange between Mr. Holmquist and any member of the board.

After the public meeting, the board went into executive session and considered the unresolved collective-bargaining issues, since a negotiation session had been scheduled for the following day, December 7, 1971. The board adopted the following resolution:

> " 'It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and *not* including agency shop; if the MTI does not accept this as a total package, the offer of arbitration is withdrawn.' " (Emphasis the board's.)

At the next day's negotiations, the board's representatives opened the meeting with the above-quoted resolution and said,

"... This is the deal." After some discussion, MTI conceded and tentative agreement was reached. The final agreement was signed December 14, 1971, with no fair-share provision, but with the arbitration provision.

In January, 1972, MTI filed a complaint with WERC alleging that the board committed a prohibited labor practice when it listened to Mr. Holmquist at its public meeting; this was said to constitute prohibited negotiating with other than the official, exclusive collective-bargaining representative, MTI. The board denied the charge. A hearing was held on February 28, 1972. On September 13, 1972, WERC concluded that the board had committed the alleged prohibited labor practices and ordered the board to cease and desist from the same.

The board petitioned the Dane county circuit court for review under ch. 227, Stats. MTI intervened. On October 2, 1973, the court entered its written decision affirming the WERC conclusion and order. Judgment affirming WERC and dismissing the petition for review was entered October 17, 1973. The board appeals from that judgment.

The basic question on the appeal is, did the board commit an unfair labor practice under the fact situation outlined above? In addition, other questions have been raised on issues of constitutionality and statutory construction.

It could be argued that as a matter of policy the board should hear not only the majority union, but any minority union groups or ad hoc committee representatives to thereby get a cross-section of all views and ascertain what all employees think of the various issues subject to collective bargaining. Under such an argument the board and its bargaining representatives should listen to and exchange ideas with all these various groups and factions within a collective bargaining unit. But that is not how collective bargaining is to be carried out under our law.

This court has held that the majority organization in a particular labor bargaining unit is, under the Municipal Employment Relation Act (MERA), sec. 111.70, Stats., not only the bargaining representative for the members of that majority organization, but is the exclusive bargaining representative of all the employees, members or non-members, of the bargaining unit. *Board of Sch. Directors of Milwaukee v. WERC, supra,* at 645-647. *Accord, Board of Education v. WERC* (1971), 52 Wis. 2d 625, 191 N.W. 2d 242. The statute also states that it is a prohibited labor practice for a municipal employer to refuse to bargain collectively with this exclusive majority representative. Sec. 111.70 (3) (a) 4, Stats. Further, it is a prohibited labor practice for the municipal employer "To interfere with, restrain or coerce municipal employes in the exercise of their rights ...," sec. 111.70 (3) (a) 1, one of which is the right "... to bargain collectively through representatives of their own choosing ...," sec. 111.70 (2). In this case, WERC concluded that the board, in allowing Mr. Holmquist to speak and in listening to his statement and his oral presentation of the results of his petition, had committed prohibited labor practices in violation of sec. 111.70 (3) (a) 1 and 4, in that it had violated its duty to bargain in good faith with MTI and had interfered with the rights of employees represented by MTI to bargain collectively through representatives of their own choosing. On this basis, WERC ordered, *inter alia*, that the board:

> "1. Shall immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc."

The WERC decision was affirmed by the circuit court.

The basic question here is whether or not the activities of the board at its public meeting constituted bargaining. The board of education in its brief concedes that bargaining by a minority group of employees with the board is prohibited by our law. In its brief the board states:

> "It may well be because of the public interest in stable labor relations permissible to restrict the rights of a minority group or individual teacher to negotiate with their employer. However, we submit to prevent an employee from providing information to his employer orally is beyond the scope of permissible restriction of the Constitutional rights of public employees to speak and petition their government."...
>
> The Board of Education does not contest the assertion that it has an obligation to bargain exclusively with the majority representative of its employees or that a 'fair share' agreement is a matter of mandatory bargaining."

The United States/[1] and Wisconsin/[2] Constitutions protect the rights of individuals to speak and to petition their federal and state governments. But it is well established that these

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/[1]The First and Fourteenth Amendments to the United States Constitution, in pertinent part, are:

> "Article I.
>
> Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
>
> "Article XIV.
>
> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

/[2]The Wisconsin Constitution provides, in pertinent part, in Article I, Sections 3 and 4:

> "Free speech; libel. Section 3. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech ..."
>
> "Right to assemble and petition. Section 4. The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

freedoms are not absolute./3 To the extent that the WERC and circuit court decisions in this case infringe upon the freedom to speak and to petition the federal and state governments, they are within the limits imposed on the restriction of those rights by United States Supreme Court decisions and the decisions of this court. What is required to overcome the constitutional prosecriptions on abridgement of these rights has been variously described as "... a clear and present danger that [the speech] will bring about the substantive evils that [the legislature] has a right to prevent," *Schenck v. United States* (1919), 249 U.S. 47, 52, 39 Sup. Ct. 247, 63 L.Ed. 470, or "... grave and immediate danger to interests which the State may lawfully protect," *West Virginia St. Brd. of Educ. v. Barnette* (1943), 319 U.S. 624, 639, 63 Sup. Ct. 1178, 87 L.Ed. 1628. Somewhat more recently the court has refined this language into a balancing test:

> " 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' " *Dennis v. United States* (1951), 341 U.S. 494, 510, 71 Sup. Ct. 857, 95 L.Ed. 1137.

This question has been answered by this court and the United States Supreme Court in the field of labor negotiations. In *Board of Sch. Directors of Milwaukee v. WERC, supra*, this court recognized the right of the certified majority union to exclusive negotiating rights with the employer. *Accord, Board of Education v. WERC* (1971), 52 Wis. 2d 625, 633, 191 N.W. 2d 242. The principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts; the

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[3] *State v. Becker* (1971), 51 Wis. 2d 659, 664, 188 N.W. 2d 449; *State ex rel. Gall v. Wittig* (1969), 42 Wis. 2d 595, 606, 167 N.W. 2d 577; *State v. Zwicker* (1969), 41 Wis. 2d 497, 509-510, 164 N.W. 2d 512; *State v. Givens* (1965), 28 Wis. 2d 109, 118, 135 N.W. 2d 780.

First Amendment rights of those persons are, to that extent, thereby infringed. But the gravity of that evil was considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations.

> "The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining .... The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca v. Sipes* (1967), 386 U.S. 171, 182, 87 Sup. Ct. 903, 17 L.Ed. 2d 842; *cf., Medo Photo Supply Corp. v. NLRB* (1944), 321 U.S. 678, 684, 64 Sup. Ct. 830, 88 L.Ed. 1007; *accord, Texaco, Inc. v. N.L.R.B.* (7th Cir. 1971), 436 Fed. 2d 520, 524.

The question of whether speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to representatives of the majority bargaining unit has been answered in the affirmative. None of the parties to this action disputes that. Now the question is whether the activity herein complained of by MTI, and subsequently prosecribed by WERC, qualifies as bargaining and can, therefore, be restricted under the rule of *Board of Sch. Directors of Milwaukee v. WERC, supra*. In that case, Justice Hanley speaking for a majority of this court defined "negotiating" as follows, p. 652:

> "Quite obviously, the determination of this issue turns on the interpretation given to 'negotiating.'
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> 'Negotiate' is defined in Webster's New International Dictionary (3d 3d.) as:
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> '... 1: to communicate or confer with another so as to arrive at the settlement of some matter: meet with another so as to arrive through discussion at some kind of agreement or compromise about something: come to terms esp. in state matters by meetings and discussions ....' "

In that case, the school board and the majority union were in the midst of negotiations on a new contract. At a public meeting of one of the committees of the school board, a representative of the minority union rose to speak on a matter which was a subject of negotiations. He was denied the right to speak. WERC considered this denial a prohibited practice. The circuit court reversed the WERC decision and was affirmed by this court; this court finding, in effect, that allowing the minority representative to speak on that subject would have constituted prohibited negotiating or bargaining with him. This court had to determine the interpretation to be given to "negotiating" and relied on the definition cited above. This court placed emphasis on the statutory requirement that no final action should be taken on such negotiated matters until they are made public and discussed in an open public meeting./[4] The court said that such "... open meeting is the necessary and final step in the 'negotiation' process between the school board and the majority teachers' union." *Board of Sch. Directors of Milwaukee v. WERC, supra*, at p. 653. Thus, it seems the court considered the school board committee meeting in that case to be a part of the "negotiation process." With the impasse that had been reached in the negotiations in the case before us with the majority union, with several members present at the board meeting, with its pickets present, and its representatives addressing the board on subjects of the collective bargaining negotiations, that meeting certainly was part of the negotiation process. The board relies heavily on the statement made by this court in that case, in which this court said:

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[4] '" '. . . the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business.' " Sec. 14.90 (1), Stats. (1967), renumbered as sec. 66.77 (1), Stats. (1973). *See, Board of Sch. Directors of Milwaukee v. WERC, supra*, at p. 650.

> "If this case involved solely the giving of a position statement at an ordinary meeting of a public body, we would have some difficulty in labeling the conduct 'negotiating.' " 42 Wis. 2d at p. 652.

What was said in the case before us goes beyond the mere giving of a "position statement" because here the statement went to the very heart of the negotiations.

As the trial court in this case pointed out in its analysis of the facts:

> "In November, 1971, a Mr. Holmquist and a Mr. Reed, both of whom are teachers employed by the school board and both of whom are not members of MTI, drafted a letter addressed to 'Dear Fellow Madisonian Educator.' Such letter, headed 'E.C. — O.L.O.G.Y.,' meaning 'Educator's Choice — Obligatory Leadership Or Goverance by You,' asked the addressee to 'Save Freedom of Choice' and stated that 'A Closed Shop (agency shop) Removes This Freedom.' The bottom portion of such letter was in the form of a ballot allowing the addressee to express his opposition to 'agency Shop.' Said letter was mailed on November 14, 1971, to all teachers in the Madison Public School system by Holmquist and Reed. Approximately two hundred replies to such letter were received, the majority of which were favorable to their position on fair share. . . .
>
> Mr. Holmquist appeared at the board meeting held on December 6, 1971, and he was permitted to speak to the board. . . .
>
> Even though Holmquist's statement superficially appears to be merely a 'position statement,' the court deems from the total circumstances that it constituted 'negotiating.' The court in *Board of School Directors, supra*, at page 653 stated:
>
> 'On the other hand, if the minority union representative is permitted to influence the decision of the school board by his argument, then he is truly "negotiating." '
>
> In the case at bar, Holmquist in fact desired to have the fair-share proposal deleted from the agreement. . . ."

We agree with the trial court that this was in fact negotiating and one need only read the Holmquist statement to see that the "information" that was being imparted was a request that the whole fair-share issue be deferred along with a counter proposal as to how the issue should be handled for possible future consideration. It also criticized MTI's handling of the negotiations in this respect.

The statement given by Mr. Holmquist was more than a mere statement of a position; it was an argument for it. Furthermore, though Mr. Holmquist was not speaking for a minority union, as in the case of *Board of Sch. Directors of Milwaukee*, it is obvious he was speaking for an *ad hoc* group which was opposed to including a fair-share agreement in any contract being negotiated at that time.

The board also argues that the WERC order must be invalidated because it is vague; if fails to provide adequate guidelines for compliance with its terms. The WERC order directs the board to cease and desist from permitting employees, other than the representatives of MTI, from appearing and speaking at meetings of the board on matters subject to collective bargaining. Matters subject to collective bargaining, as opposed to subjects reserved to management, are defined as "wages, hours and conditions of employment" Sec. 111.70(1)(d), Stats. The board argues that "conditions of employment" is constitutionally vague and, thus, the order must be voided.

The board, however, has no standing to raise the question. It has conceded in its brief and at oral argument that the matter spoken of by Mr. Holmquist before the board was a subject of collective bargaining. Thus, whatever the vagaries of the WERC order as it may or may not affect others, it is both a plain fact and conceded by the board that there is no vagueness in that order as it affects the board's conduct here.

> "... even if the outermost boundaries of [the prohibition] may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the 'hard core' of the ... proscriptions ...." *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 608, 93 Sup. Ct. 2908, 37 L.Ed. 2d 830. *Accord, Paulos v. Breier* (7th Cir. 1974), 507 Fed. 2d 1383, 1387, 1388; *Driscoll v. Schmidt* (W.D. Wis. 1973), 354 Fed. Supp. 1225, 1229.

The law is clear that "(o)ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy* (1974), 417 U.S. 733, 94 Sup. Ct. 2547, 2562, 41 L.Ed. 2d 439. The board has no standing to raise the vagueness claim.

Furthermore, "wages, hours and conditions of employment" is the phrase commonly used to describe what are subjects of collective bargaining. It is used in the NLRA, 29 USC secs. 152 (9) and 159 (a). Certainly, "(w)ords inevitably contain germs of uncertainty ...," *Broadrick v. Okla., supra*, at p. 608, but the test to avoid unconstitutional vagueness does not require crystal clarity:

> "There might be quibbles about the meaning of [certain language]; but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *United States Civil Service Commission v. Nat'l Assoc. of Letter Carriers, — AFL-CIO* (1973), 413 U.S. 548, 577-578, 579, 93 Sup. Ct. 2880, 37 L.Ed. 2d 796. *See also, Weber v. State* (1973), 59 Wis. 2d 371, 382, 208 N.W. 2d 396.

We conclude the order of the Wisconsin Employment Relations Commission of September 13, 1972, is not vague.

By the Court. — Judgment affirmed.

No. 410

August Term, 1974

STATE OF WISCONSIN: IN SUPREME COURT

CITY OF MADISON, JT. SCHOOL DIST. NO. 8, et al.,
Appellants,

v.

WIS. EMPLOYMENT RELATIONS COMMISSION,
Respondent,

MADISON TEACHERS, INC.,
Intervenor-Respondent.

ROBERT W. HANSEN, J. *(dissenting).* What is wrong with holding that only the spokesman for the designated bargaining agent of the teachers may speak on employment-related school matters at a public meeting of a public school board? What is wrong is that it denies the constitutional assurances as to freedom of speech and petition to individual school teachers and other teacher groups.

The First Amendment to the United States Constitution guarantees that "Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."/[1] The Wisconsin Constitution assures the right of every person to "... freely speak, write and publish his

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/[1]Amendments to the United States Constitution, art. I, made applicable to states by the "due process" clause of the Fourteenth Amendment. *See: Joseph Burstyn, Inc. v. Wilson* (1952), 343 U.S. 495, 72 Sup. Ct. 777, 96 L.Ed. 1098. *See also: Lawson v. Housing Authority of Milwaukee* (1955), 270 Wis. 269, 70 N.W. 2d 605, recognizing such applicability.

sentiments on all subjects ..." and to "... petition the government or any department thereof...."/[2] The United States Supreme Court has made clear that as a constitutional matter teachers may not be "... compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work...."/[3] These constitutional guarantees protect all citizens, public school teachers included, with the nature of the teaching profession bringing "... the safeguards of those amendments vividly into operation."/[4]

/[2]Wisconsin Constitution, art. I, sec. 3 providing: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to retrain or abridge the liberty of speech or of the press. ..." And, art. 1, sec. 4, providing: "The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

/[3]*Pickering v. Board of Education* (1968), 391 U.S. 563, 568, 88 Sup. Ct. 1731, 20 L.Ed. 2d 811.

/[4]*See: Wieman v. Updegraff* (1952), 344 U.S. 183, 73 Sup. Ct. 215, 97 L.Ed. 216, Mr. JUSTICE FRANKFURTER in concurring opinion (page 195) stating: "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice...."

We deal here with the right of a teacher to speak at a public meeting of a school board on school matters — during the portion of such meeting set aside for appearances by the general public. /5. During such citizens-invited-to-present-points-of-view part of the meeting, the president of the teachers' association that was the sole collective bargaining agent spoke for a fair-share proposal,/6 and presented a petition or statement signed by between thirteen and fourteen hundred teachers urging continued negotiations and early agreement. Then an individual teacher requested permission to speak, without indicating what he intended to talk about. Given such permission, he stated that he represented "... an informal committee of 72 teachers in 49 schools," urged further study of the fair-share proposal and stated he would submit a petition signed by teachers who favored delay for study. The school board permitted both the association president and the committee spokesman to speak and listened to both when they spoke.

The state employment relations board found that the Madison school board, by listening to the teacher who spoke after the president of the teachers' association had concluded his remarks, had committed a "prohibited practice" in violation of

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/5The meeting involved was the regular and scheduled meeting of the board of education of the city of Madison, joint school district No. 8, on the evening of December 6, 1971. A portion of each regular meeting of this board is opened and devoted to appearances by the public, permitting concerned citizens to present their points of view on school matters to the board.

/6Sec. 111.70 (2), Stats., provides the procedure by which a union security agreement designated "fair share" may be established or terminated.

sec. 111.70 (3) (a) (1) and (4), Stats./7 The employment relations board ordered the school board to "... immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining...." The circuit court upheld such order, and the majority of our court affirms.

The writer sees three constitutional infirmities in the employment relations board's order, all related to the First Amendment and the corollary state constitutional guarantees as to freedom of speech and right to petition for redress of grievances.

THE RIGHT TO SPEAK. When a school board sets aside a portion of its regular meeting as a public forum where citizens generally may state their views on school matters, the invitation and the right to appear go to all citizens, teachers included. The school board is a public body. The meetings are public meetings. Its open discussion periods are just that — open to the public, teachers included. The majority opinion finds the exclusion of teachers or teacher groups, other than the one designated as collective bargaining agent, was here justified and required by the State Municipal Employment Relations Act, which provides for an exclusive bargaining representative for an appropriate

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/7Sec. 111.70 (3) (a) (1), Stats., provides that it is a prohibited practice for a municipal employer "... (1) To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)." Sub. (2) provides that it is a prohibited practice "... (2) To initiate, create, dominate or interfere with the formation or administration of any labor or employe organization...." Sub. (4) provides that it is a prohibited practice "... (4) To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. . . ."

bargaining unit./[8] As to an individual's right to speak at a public hearing or a public meeting of a public body, we would see any duties or rights deriving from the Employment Relations Act as limited by rights granted by our constitutions, federal and state. If there is a crunch, it is the statute, not the constitutional right, that must yield. However, in the situation before us, the writer sees no crunch or conflict. The association or union, selected as the bargaining agent for the employees, is the sole bargaining representative of the employees in bargaining sessions between employer and such bargaining agent. These meetings are not public. What the group, selected as sole bargaining agent in the election to select such representative, won was the right to represent the employees in the bargaining unit in bargaining sessions and negotiations with the employer. What it did not win was the right to speak, during a public discussion period, at a public meeting of a public body, with all other voices of individual teachers or groups of teachers to be silenced. The school board here is not required to conduct public discussion periods at its meetings while collective bargaining is going on. It is not required, the writer thinks, to hear any discussion of stated and specified topics or issues that are involved in the collective bargaining negotiations between it and the designated collective bargaining agent. But what it cannot do, much less be required to do, is to permit the representative of the employees for bargaining purposes to speak at a public meeting while a gag is placed over the mouths of all individual teachers or other teacher group representatives. This sauce of right to speak at a public meeting cannot be served to one, without being available to the others. It is true that, as to the right of a minority union to speak at a committee meeting dealing with matters involved in collective bargaining negotiations, this court did deny the right

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[8]Subch. IV, secs. 111.70 to 111.77, Stats., the Municipal Employment Relations Act.

of minority unions to be heard at such meeting./[9] However, in that case, our court held: "If this case involved solely the giving of a position statement at an ordinary meeting of a public body, we would have some difficulty in labeling the conduct 'negotiating' "/[10] In the case now before us we do have "... solely the giving of a position statement at an ordinary meeting of a public body."/[11] Restrictions as to length, relevancy or to "giving of a position statement" raise no constitutional questions. They are all implicit in an invitation to appear at a public discussion at a public meeting of a public board. The writer has no quarrel with the Milwaukee case, as limited. However, the writer sees the exclusivity of bargaining representation in employer-employee relations as not here reaching or including the right of the designated representative to speak at a public forum portion of a school board meeting, with all other teacher voices to be silenced. Actually, the employment relations board order does not deny the right of the individual teacher to speak. It only denies the right of the school board to listen. But the right to speak with no one to listen is hardly what the constitutional guarantees envision or protect. The writer, under these circumstances, sees the right of the teacher to speak and the school board to listen as alike constitutionally protected.

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[9]*Board of School Directors of Milwaukee v. WERC* (1969), 42 Wis. 2d 637, 168 N.W. 2d 92. *See also: Board of Education v. WERC* (1971), 52 Wis. 2d 625, 191 N.W. 2d 242.

[10]*Id.* at page 652.

[11]The teacher whose right to speak is here challenged also stated that he intended to present a petition signed by teachers in the school system. However, the order of the employment relations board holds only that permitting the teacher to speak exceeded the bounds of permissible conduct, apparently conceding that sec. 111.70 (2), Stats., authorizes and requires a municipal employer to receive a petition of employees as to a fair-share agreement.

CENSORSHIP OF CONTENT. As to the brief presentation here made by the individual teacher and spokesman for the informal teachers' committee, the majority finds it to have been "... more than a mere statement of a position; it was an argument for it." Unless a speaker takes a firm stand on both sides of the fence, it is difficult to see where a statement of position would not be for or against a proposal or proposition. Here the teacher who spoke identified himself and then read the text of the petition being circulated which he stated would be filed with the board. The petition asked study by an impartial committee. If this was argumentative, it was only mildly so. But the issue as to content of what was or might be said goes deeper. The majority defends the employment relations board order against the charge of vagueness. It finds no vagueness in the board order as it affects "... the boards conduct here." That is certainly true, but, in the First Amendment context, the question of scope or uncertainty as to future application goes to the chilling effect of the order upon the right of free speech. The employment relations board concluded that, when a teacher asks to speak to the board during a public discussion period at a regular board meeting, the board must inquire as to the nature of the speech. Then, if the topic is a matter subject to collective bargaining, the board must refuse to allow the teacher to speak. What matters are subject to collective bargaining? The statute provides that a municipal employer must bargain in good faith on matters of wages, hours and working conditions./[12] As appellant suggests, certain questions arise. Suppose the teacher wishes to speak on class size or teachers' aides, the establishment of summer programs, school

/[12]Sec. 111.70 (1) (d), Stats., provides: " 'Collective bargaining' means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, *with respect to wages, hours and conditions of employment....*" [Emphasis supplied.]

reading projects, in-service training, or the special treatment and handling of problem students. Are these matters subject to collective bargaining on which the board is restricted from receiving information from teachers other than the majority representative of its employees? Nothing in the Municipal Employment Relations Act suggests that a teacher does not have a right to speak at a public meeting on these matters, yet all could be covered or affected by a collective bargaining agreement. It is in this sense that the department order is vague, not meaning that it cannot be understood and applied by this school board to the facts here, but because the difficulty of locating its outer limits will have a chilling effect both on the right of teachers to speak and school boards to listen on topics, arguably relatable to bargaining, but directly concerned with the well-being of school children and the community. The prudent school board would resolve doubts against the right of an individual teacher to speak on marginal or in-doubt topics, and that is what is meant by having a chilling effect. The writer would hold the order, in its scope and breadth, to have a constitutionally impermissible temperature-lowering effect on the exercise of First Amendment rights.

JUSTIFICATION FOR INFRINGEMENT. The majority opinion sets forth the federal and state constitutional guarantees of the rights of individuals to speak and to petition government for redress of grievances. It then concedes: "There can be no doubt that the WERC and circuit court decisions in this case infringe upon thse protected freedoms." Such infringement of a constitutional right, the majority writes and the writer agrees, may be permitted where there is a "... grave and immediate danger to interests which the State may lawfully protect./[13] The question is whether the gravity of the dangers

/[13]*West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624, 639, 63 Sup. Ct. 1178, 87 L.Ed. 1628. (Quoted in majority opinion.)

justifies the admitted infringement./[14] In the case before us, the majority holds, the gravity of infringing upon two rights, assured by federal and state constitutions, is "... considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations." The employment relations board was more restrained, seeing two "salutary purposes" served by its order — *i.e.*, it "stabilizes the bargaining relations" and it serves the "unity of collective clout" which "advances the welfare of public employes." How can either statement of the public purpose served withstand the obvious fact that the danger alluded to could be entirely avoided by permitting no discussion at a public appearance portion of a regular school board meeting — by anybody — of specified topics and areas of discussion, announced and stated in advance of the public meeting. That would avoid treating a public meeting of a public body both as a collective bargaining session and as an opportunity for presentation of points of view by members of the public with only individual teachers silenced and not permitted to speak. Even if this individual teacher, speaking for himself or for his informal committee, were permitted to state his or their position during a public discussion period at a regular school board meeting, could grave danger, much less "chaos," be a likely or reasonably predictable result? This is no "shouting Fire in a crowded theater" situation. Any conflict between exclusivity in bargaining and the teachers' rights of free speech can be here entirely avoided by advance listing of topics that no one may discuss during the public-invited period of the school board meeting. The writer sees no reason here for holding that anyone except an individual school teacher or minority teacher group may speak freely on school affairs at a school board meeting. Town meeting type discussions at school board

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/[14] *Dennis v. United States* (1951), 341 U.S. 494, 510, 71 Sup. Ct. 857, 95 L.Ed. 1137. (Quoted in majority opinion.)

meetings are in the American tradition, but town meetings were open to everyone, not everyone except school teachers. Freedom of speech "... lies at the foundation of a free society,"/[15] and "... speech concerning public affairs is more than self-expression; it is the essence of self-government."/[16] The writer would reverse. As to teacher participation in a public discussion at a public meeting of a public body, the writer finds here no showing of facts present or danger threatened that either requires or warrants denying this teacher and any other teacher so situated, "... the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work...."/[17]

I am authorized to state that Mr. Justice Bruce F. Beilfus and Mr. Justice Connor T. Hansen join in this dissent.

/[15] *Shelton v. Tucker* (1960), 364 U.S. 479, 486, 81 Sup. Ct. 247, 5 L.Ed. 2d 231.

/[16] *Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 75, 85 Sup. Ct. 209, 13 L.Ed. 2d 125.

/[17] *Pickering v. Board of Education, supra*, footnote 3, at page 568.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

#137-382

CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8 et al

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent,

MADISON TEACHERS INCORPORATED,

Intervenor Respondent.

MEMORANDUM DECISION

The petitioner in this action pursuant to Chapter 227, Stats., seeks review of a decision and order of the Wisconsin Employment Relations Commission dated September 13, 1972, which determined that said petitioner had committed unfair practices prohibited by sec. 111.70 (3) (a) 1 and 4.of the Municipal Employment Relations Act.

The petitioner (hereinafter "school board") and Madison Teachers, Inc. (hereinafter "MTI") were parties to a labor agreement covering teachers and other employees, which ran from January 1, 1971, to December 31, 1971. Said agreement contained, inter alia, a provision that the school board would bargain exclusively with MTI.

On January 25, 1971. MTI gave the school board timely notice of its desire to modify the existing agreement for the year 1972. Conferences and negotiations between the parties for a successor agreement continued during the year until October 4, 1971. By November, 1971, two primary issues remained unresolved, viz., a fair share agreement and binding arbitration of teacher nonrenewals and dismissals.

In November, 1971, a Mr. Holmquist and a Mr. Reed, both of whom are teachers employed by the school board and both of whom are not members of MTI, drafted a letter addressed to "Dear Fellow Madisonian Educator." Such letter, headed "E.C. — O.L.O.G.Y.," meaning "Educator's Choice — Obligatory Leadership Or Goverance by You," asked the addressee to "Save Freedom of Choice" and stated that "A Closed Shop (agency shop) Removes This Freedom." The bottom portion of such letter was in the form of a ballot allowing the addressee to express his opposition to "agency shop." Said letter was mailed on November 14, 1971, to all teachers in the Madison Public School system by Holmquist and Reed. Approximately two hundred replies to such letter were received, the majority of which were favorable to their position on fair share.

On December 2, 1971, a meeting of 14 teachers who wished to work against any fair share agreement resulted in a memorandum entitled "Points of Information" and a petition which were distributed to the teachers employed by the School District.

Prior to the December 6, 1971, school board meeting, Mr. Keith Yelinek, a member of the board, was informed that individuals other than authorized agents of MTI intended to speak at such meeting on fair share. Mr. Yelinek was presented with copies of the court's decision in *Board of School Directors of Milwaukee v. W.E.R.C.*, 42 Wis. 2d 637 (1968), and he indicated he would relate such information to the board.

Mr. Holmquist appeared at the board meeting held on December 6, 1971, and he was permitted to speak to the board. Mr. Holmquist prefaced his remarks to the board by stating:

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers Incorporated, about the results of an

informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package."

He then read to the board the text of a petition he had circulated among bargaining unit teachers dated December 6, 1971. In so doing, he stated as follows:

"To: Madison Board of Education, Madison Teachers Incorporated. We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair share proposal. 4) The results of this written ballot be made public.

"We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the 'whole package' and therefore is not issue specific.... Neither has properly addressed the serious issue of fair share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it. For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation."

At the end of his remarks, Mrs. Doyle, president of the Board of Education, asked Mr. Holmquist, "Do you intend to communicate these petitions to the Board when you have them all?" Mr. Holmquist replied, "Yes."

After the meeting the board went into executive session. As a result of such discussion, the following resolution was adopted:

"It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and *not* including agency shop; if the MTI does not accept this as a total package the offer of arbitration is withdrawn."

In later negotiations the board remained adamant in their position and the parties finally accepted such as the Agreement on December 14, 1971.

On January 5, 1972, MTI filed a complaint with the Wisconsin Employment Relations Commission against the board for alleged violations of sec. 111.70 (3) (a) (1) and 111.70 (3) (a) (4), Stats. The Commission issued its Findings of Fact, Conclusions of Law and Order on September 13, 1972. The petition seeking review of such Findings, Conclusions, and Order is presently before the court.

The court is of the opinion that denying a representative of a minority of the bargaining unit employees the right to appear at a public meeting of the board and to speak to the board on mandatory subjects of bargaining does not infringe upon the right of freedom of expression or the right to petition one's government, as guaranteed by the Wisconsin and United States Constitutions.

The Wisconsin Supreme Court in *Board of School Directors v. W.E.R.C.*, 42 Wis. 2d 637 (1968), held that a school board could properly deny the representative of a minority union the right to speak at a public meeting of the school board on negotiable matters and that such denial did not infringe upon the right of free speech as guaranteed by the Wisconsin Constitution.

The court held that a minority union had no right to negotiate with the employer and that, if the employer negotiated with the minority union, that in itself would be a prohibited practice. As the court stated in *LaCrosse County Institution Employees v. W.E.R.C.*, 52 Wis. 2d 295, 300 (1971):

> "The essence of the *Board of School Directors* case was merely that, if a municipality sees fit to bargain, it must do so with the certified representative of the employees and cannot negotiate with a minority union."

The crux of this case thus reduces to whether Holmquist's "statement" before the board constituted "negotiation" or was merely the giving of a "position statement." This same issue was extensively discussed in the *Board of School Directors* case, supra. The court stated at page 652:

> "If this case involved solely the giving of a position statement at an ordinary meeting of a public body, we would have some difficulty in labeling the conduct 'negotiating.' "

Even though Holmquist's statement superficially appears to be merely a "position statement," the court deems from the total circumstances that it constituted "negotiating." The court in *Board of School Directors*, supra, at page 653 stated:

> "On the other hand, if the minority union representative is permitted to influence the decision of the school board by his argument, then he is truly 'negotiating.' "

In the case at bar, Holmquist in fact desired to have the fair-share proposal deleted from the agreement. In addition, the school district did not remain passive in relation to this matter. When Reed and Holmquist commenced their anti-fair-share campaign, they showed their anti-fair-share document entitled "E.C. — O.L.O.G.Y." to building principals. They also received permission to circulate the "informational letter" to teachers through the teacher mail boxes. They were also permitted to circulate their anti-fair-share petition to teachers in the school buildings. Such permissiveness was in direct contradiction to

Article V, paragraph J, at page 57, and Article V, paragraph K, at page 57, of the negotiated agreement in effect between MTI and the board. Thus, the board's conduct involved more than its permitting Holmquist to speak to it on fair-share. It involved conduct which could only have for its purpose the frustration of the rights of the majority.

The court is also of the opinion that the decision of the Wisconsin Employment Relations Commission is reasonable and is not inconsistent with the requirements of sec. 111.70(3)(a)(3), Stats. Such decision does not require the employer to refuse to meet its statutory obligations under sec. 111.70(4)(d), Stats., nor is it contrary to the intent of sec. 111.70(2), Stats.

Accordingly, the Findings and Order of the Commission are affirmed. Counsel may prepare an appropriate judgment for the court's signature.

Dated: October 2, 1973.

BY THE COURT:

/s/ William C. Sachtjen
William C. Sachtjen, Judge

cc Attys. Kops, Hoornstra, Kelly, Ruhly

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

MADISON TEACHERS, INC.,

Complainant,

vs.

JOINT SCHOOL DISTRICT NO. 8, CITY
OF MADISON, VILLAGES OF MAPLE BLUFF
AND SHOREWOOD HILLS, TOWNS OF MADISON,
BLOOMING GROVE, FITCHBURG
AND BURKE, AND THE BOARD OF EDUCATION
OF JOINT SCHOOL DISTRICT No. 8, et al,

Respondents.

Case VIII
No. 15210 MP-107
Decision No. 11271

Appearances:

Madison City Attorney, by *Mr. Gerald Kops*, Assistant City Attorney, appearing on behalf of the Respondents.

Mr. Robert C. Kelly, Attorney at Law, appearing on behalf of the Complainant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Madison Teachers, Inc. having on January 6, 1972, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that Joint School District No. 8, City of Madison, et al. and the Board of Education of said school district had committed certain prohibited practices within the meaning of the Municipal Employment Relations Act; and hearing in the matter having been conducted on February 28,

1972 at Madison, Wisconsin by the Wisconsin Employment Relations Commission, Chairman Morris Slavney and Commissioner Zel S. Rice II being present; and the Commission, having reviewed the evidence and briefs of Counsel, as well as briefs amicae filed by the Wisconsin Education Association, and the National Right To Work Legal Defense Foundation, being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Complainant, Madison Teachers, Inc., hereinafter referred to as MTI, is a labor organization, having its principal office at 121 South Hancock Street, Madison, Wisconsin.

2. That the Respondent Joint School District No. 8, City of Madison, Villages of Maple Bluff, and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg, and Burke, hereinafter referred to as the District, operates a school system in said city, villages and towns, and has its principal office at 545 West Dayton Street, Madison, Wisconsin; and that Respondent Board of Education of the District, hereinafter referred to as the Board, is an agent of the District and is charged with the possession, care, control and management of the property and the affairs of the District.

3. That MTI is the majority collective bargaining representative for all regular full-time and regular part-time certificated teaching personnel employed by the District, including psychologists, psychometrists, social workers, attendants and visitation workers, work experience coordinator, remedial reading, University Hospital teacher, trainable group, librarians, guidance counselors, teaching assistant principals (except at Sunnyside school), teachers on leave of absence, but excluding on-call substitute teachers, interns and all other employes, principals, supervisors and administrators, having been certified as such by the Wisconsin Employment Relations Commission on June 7, 1966.

4. That since 1966, MTI and the Board have, as a result of conferences and negotiations, entered into a series of collective bargaining agreements covering the wages, hours and conditions of employment of the aforementioned bargaining unit personnel, the last of such written agreements had for its term the period commencing January 1, 1971 and ending December 31, 1971; that said agreement included among it provisions the following in Article II:

"A. CONFERENCE AND NEGOTIATION

. . .

c. Each party to this Agreement desiring to be represented by agents for negotiating agrees to furnish to the other party a list of its duly authorized agents for such purposes. Each party agrees to negotiate only with said agent and no others, including their principals, namely, the Board of Education or Madison Teachers, as the case may be, unless the latter as principals authorize negotiations with others or themselves.

d. If matters which are proper subjects of negotiations are brought, whether in the form of a grievance, petition or otherwise, to the attention of either of the parties to this Agreement by any individual, group of individuals or organization other than the other party to this Agreement or its duly authorized agents such latter party shall be punctually informed of such action."

5. That by letter dated January 25, 1971, MTI gave the Board timely notice of its desire to modify the existing written agreement as of the end of its term; that MTI accompanied such notice with its written proposal of modifications, deletions and additions to be made in such existing agreement for the 1972 agreement; that included in such proposal was a proposal that the 1972 agreement, covering the 1972 calendar year, contain a fair share agreement.

6. That conferences and negotiations between the parties for a successor agreement covering the calendar year 1972 continued until October 4, 1971; that the fair share proposal was a subject of such conferences and negotiations during this entire period of time; that the Board objected to incorporating the proposed fair share agreement into the 1972 agreement, for one of the reasons that fair share agreements were not permitted under the law, specifically under Section 111.70 of the Wisconsin Statutes as then promulgated; that on October 4, 1971, MTI submitted a revised fair share proposal to the Board in negotiations, wherein the MTI proposed that the parties agreed to incorporate a fair share agreement into the 1972 agreement, but that such fair share agreement would not become effective until such provisions were specifically permitted by enabling legislation; and that the fair share agreement proposal continued to be a subject under discussion at the bargaining table.

7. That Chapter 124, Laws of 1971, as adopted by the Legislature was published on November 10, 1971, becoming effective by virtue of Section 990.05, Wis. Stats. on November 11, 1971; that Chapter 124, Laws of 1971, among other things amended Section 111.70 (2), Wis. Stats. so as to permit municipal employers and the majority representative of its employes to enter into a fair share agreement as defined by Section 111.70(1) (h) of the Statutes; that thereafter, on November 17, 1971, MTI submitted to the Board in negotiations, a third fair share proposal, which proposal complied with the provisions of Municipal Employment Relations Act established by Chapter 124, Laws of 1971, relative to fair share agreements.

8. That by November, 1971 the number of unresolved issues between the parties was reduced to approximately thirteen, including issues with respect to MTI's proposals of binding arbitration of nonrenewal of teacher contracts and teacher dismissals, as well as the fair share agreement; that the Board

had stood fully opposed to providing for binding arbitration of teacher nonrenewals and teacher dismissals during the entire period of negotiations first commencing on January 25, 1971; that, likewise, the Board had consistently taken a position against MTI's fair share proposal; that however, at one time in the latter part of October, or early part of November, Paul Olson, Chief Negotiator for the Board, during a meeting Chief Negotiator for MTI, indicated that he could see no way in which the Board would grant bindining arbitration of teacher nonrenewal and dismissal, but that there was a distinct possibility that the Board would grant fair share; and that Olson had also indicated to MTI that there were two members of the Board who would grant the fair share proposal if MTI would drop its demand for binding arbitration of teacher nonrenewal and dismissal.

9. That in November, 1971 Ralph K. Reed and Albert Holmquist, teachers employed by the District, neither of whom are members of MTI, drafted a document, made a part hereof as Appendix "A", and mailed same on November 14, 1971 to all teachers in the employ of the District.

10. That Reed and Holmquist received approximately two hundred replies to such letter, the majority of which were favorable to their position on fair share; that thereafter Reed and Holmquist called a meeting of those teachers who had indicated they would work actively against any fair share agreement; that such meeting was held on Thursday, December 2, 1971, and was attended by fourteen teachers, seven of whom were MTI members and seven of whom were not; that as a result of said meeting additional three documents, made a part hereof as Appendix "B", "C", and "D", were prepared and printed and hand delivered or mailed to certain teachers, who distributed said documents to other teachers during their free periods in the various schools between December 2nd and 6th, 1971.

11. That on December 6, 1971 Reed, upon his request, was given permission by the Principals of Van Hise Elementary and Junior High Schools to circulate the "petition" among teachers in said schools on Reed's free time, as well as permission to use the teachers' school mailboxes for the distribution of a letter, made a part hereof as Appendix "E".

12. That a regular meeting of the Baord was held during the evening of December 6, 1971; that among others present at said meeting, were officers and representatives of MTI, as well as three to four hundred teachers, who were members of MTI; that Reed and Holmquist were also present; that during a portion of said meeting, described in the meeting agenda as "Public Appearances", the president of MTI, Paul Du Vair, addressed the Board, urging the Board to resume negotiations with MTI and to reach an agreement on the provisions of the 1972 collective bargaining agreement; that upon the conclusion of his remarks, Du Vair presented to the Board a statement, containing the signatures of between thirteen and fourteen hundred teachers, setting forth that "We the undersigned wish the parties to resume negotiations and reach agreement as quickly as possible"; that Holmquist was also permitted to speak to the Board; that Holmquist prefaced his remarks to the Board by stating:

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package.";

that Holmquist then read to the Board the text of the Petition he had circulated among the teachers dated December 6, 1971; that in so doing he stated as follows:

"To: Madison Board of Education, Madison Teachers Incorporated. We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair share proposal. 4) The results of this written ballot be made public."

"We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the 'whole package' and therefore is not issue specific ... Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it. For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation."

13. That at the conclusion of Holmquist's remarks, Mrs. Doyle, President of the Board, asked Holmquist, "Do you intend to communicate these petitions to the Board when you have them all."; that Holmquist replied in the affirmative; and that no other Board member spoke to Holmquist on the matter; that immediately after its regular public meeting the Board went into executive session, during which the unresolved issues, including arbitration of teacher nonrenewal and dismissal and fair share were discussed by the Board; that as a result of such discussion a resolution was adopted by the Board as follows:

"It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and *not* including agency shop; if the MTI does not accept this as a total package the offer of arbitration is withdrawn".

14. That on December 7, 1971, authorized representatives of MTI met with authorized representatives of the Board in a previously scheduled negotiations meeting; that Dr. Ritchie, Superintendent of Schools, and an agent of the District, at the opening of such negotiation meeting, gave the representatives of MTI a copy of the above resolution informing such representatives that such resolution stated the Board's position, indeed "that this was the deal"; that discussions concerning the Board's position and fair share took place during such meeting; that the Board's representatives remained adamant in their position and in the afternoon of that day the parties reached tentative agreement upon MTI accepting the Board's position and that such tentative agreement was accepted as the Agreement by both parties on December 14, 1971.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

That Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al, in permitting teacher Albert Holmquist to appear and speak at a meeting of the Board on December 6, 1971, as a representative of a minority of the teachers in its employ, on the matter of the fair share agreement, a matter subject to negotiations between said Municipal Employer and Madison Teachers, Inc., the majority bargaining representative of certificated teaching personnel in the employ of said Municipal Employer, violated its duty to bargain in good faith with Madison Teachers Inc., and Joint School District No.

8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al, thereby interfered with the rights of employes represented by Madison Teachers Inc. to bargain collectively with representatives of their own choosing, and further thereby Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison , Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al, committed prohibited practices within the meaning of Sections 111.70 (3) (a) 4 and 1 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes the following

ORDER

IT IS ORDERED that Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al,

1. Shall immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc.

2. Take the following affirmative action which will effectuate the policies of the Municipal Employment Relations Act;

(a) Officially incorporate the instant Findings of Fact, Conclusions of Law and Order in the minutes of the Board of Education.

(b) Immediately notify Madison Teachers Inc. that they will not permit any employe in the bargaining unit

represented by Madison Teachers Inc., other than a representative of Madison Teachers Inc., to appear and speak on matters subject to collective bargaining between them and Madison Teachers Inc.

(c) Notify the Wisconsin Employment Relations commission within thirty (30) days of the receipt of a copy of this Order as to what steps they have taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 13th day of September, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Morris Slavney /s/*
Morris Slavney, Chairman

Zel S. Rice II /s/
Zel S. Rice II, Commissioner

Jos. B. Kerkman /s/
Jos. B. Kerkman, Commissioner

APPENDIX "A"

"Dear Fellow Madisonian Educator,

E. C. — O. L. O. G. Y.

*E*ducator's *C*hoice - *O*bligatory *L*eadership *O*r *G*rievance by *Y*ou

SAVE FREEDOM OF CHOICE

A Closed Shop (agency shop) Removes This Freedom

1. Does an organization which represents the best interests of teachers and pupils NEED mandatory membership deductions?

2. Need relationships between administrators and teachers be further strained by LEGALLY providing for mandatory adversary camps?
3. Should minority voices be mandatorily SILENCED?
4. Could elimination of outside dissent produce NON-RESPONSIVENESS to change?
5. And . . .

   isn't this lack of FREEDOM OF CHOICE undemocratic?

SUPPORT FREEDOM OF CHOICE —
OPPOSE AGENCY SHOP

I wish to maintain freedom of choice:

I oppose agency shop on principle

I oppose agency shop and would sign a petition stating so

I oppose agency shop and would work actively to maintain freedom of choice

Let us hear from YOU.

Al Holmquist /s/
Al Holmquist

E.C.—O.L.O.G.Y.
P.O Box 5184
Madison, WI 53705

Ralph Reed /s/

Ralph Reed
Teacher co-chairmen"

APPENDIX "B"

"Dear Colleague,

1) The enclosed petition was drawn up Thursday night by a group of teachers.
2) Accompanying it is a letter of current, pertitant information. It may be used as a source for your own personal reference, posted on bulletin boards or even

dittoed for mailbox stuffing (which is allowable). Please add information you may have to make it as specific to your situation as possible. (as below)

3) The following people in your school:

   have written they would also work actively

   have written they would sign the petition

   have written they are opposed to the concept of agency shop on principle

   Thirty-five others mailed in unsigned responses but indicated that they would sign the petition.

4) It is imperative to work quickly. We would like to present a first-day's total to MTI and the Board of Education this MONDAY night, Dec. 6. (It is the night of the last board meeting under our present contract)

   Please call in 1) the number of signers

   2) the percentage of your faculty contacted the first day

   _____ between 5 and 7 pm

5) When you have contacted everyone in your school affected by the contract please return the petition to Concerned Educators, Box 5184, Madison, Wi 53705

Who will sign for certain?

Who will sign after others do?

Which others?

Who might sign if you ask them first but might not sign later?

Would a closed system be as responsive? to individual members

Isn't a loyal opposition necessary?

Freedom of Choice?

Ability to influence an
organization by withholding
of dues?

Who won't sign? (Don't be sure. Half of the people who wrote the petition are MTI members. Many MTI'ers responded to the original letter. And this point *was* included in the negotiation package by a close vote of the board of directors)

Thank you for your efforts and your support.

The Committee"

APPENDIX "C"

"POINTS OF INFORMATION

1. FAIR-SHARE, agency shop, and union shop need not be the same thing

fair-share —	the bargaining unit collects that *portion* of dues that goes *directly* toward negotiation and contract administration costs
agency shop —	the bargaining unit collects uniform dues and fees from members and non-members as a condition of employment
union shop —	you have thirty days to join the union or you have no job.

2. However, the current fair-share agreement proposal, in its language, EQUATES fair-share agreement and agency shop by definition.

   'It is understood and agreed by and between the parties hereto that the employer will deduct from the monthly earning of the employees in the collective bargaining unit a fair share, SUCH AMOUNT BEING the monthly dues certified by Madison Teachers as the current dues UNIFORMLY REQUIRED OF ALL MEMBERS.'

3. This proposal, as is, was included as a point for negotiation by a close vote of the MTI board of directors.
4. MTI has refused to poll its membership on this perhaps critical individual point of negotiation.
5. It is true that legally, one need not join MTI under the fair share proposal.
6. However, even with a real fair-share agreement (as well as with the present proposal) everyone covered by the contract *must* become a MEMBER OF WEA and NEA. Right now part-time teachers who pay partial MTI dues *must* pay full NEA and WEA dues as full members.
7. For even a real fair-share proposal to take effect it must have the support of the majority of all affected by the contract.
8. The enabling legislation, Senate bill 198A, is constitutional according to our legal advice.
9. The petition is not to be construed as anti-MTI. All that is asked is that the present fair-share proposal be defered this year until adequate study and dissemination of information — and *your* opinion is known.

for communication, not confrontation"

APPENDIX "D"

"To: Madison Board of Education

Madison Teachers, Incorporated

We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers, Incorporated and the Madison Board of Education be defered this year. We propose the following:L

1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups.

2) The findings of this study be made public.

3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal.

4) The results of this written ballot be made public.

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

APPENDIX "E"

"Dear fellow Van Hise Teachers, Dec. 6, 1971

In the next few days you will be asked to sign a petition asking that the FAIR SHARE (AGENCY SHOP) proposal being negotiated between M.T.I. and the Board of Education be deferred until the topic has been studied, information from the study has been disseminated to all concerned, and all teachers have been balloted as to their position on this important issue.

Please consider the following informational points:

1. FAIR-SHARE, agency shop, and union shop need not be the same thing.

   Fair-share: The bargaining unit collects that *portion* of dues that goes *directly* toward negotiation and contract administration costs.

   Agency shop: The bargaining unit collects uniform dues and fees from members and non-members as a condition of employment.

   Union shop: All employees have thirty days to join the union or they loose their job.

2. The current fair-share proposal, in its language, EQUATES fair-share agreement and agency shop by definition.

'It is understood and agreed by and between the parties hereto that the employer will deduct from the monthly earning of the employees in the collective bargaining unit a fair share, SUCH AMOUNT BEING the monthly dues certified by Madison Teachers Incorporated, as the CURRENT DUES UNIFORMLY REQUIRED OF ALL MEMBERS.' (emphasis mine)

3. This proposal was included as a point for negotiation by a very close vote of the MTI board of directors.

4. MTI has refused to poll its membership in this perhaps critical individual point of negotiation.

5. Legally, it is true that one need not joint MTI under the fair share proposal.

6. However, even with a 'real' fair-share agreement (as well as with the present proposal) everyone covered by the contract *must* become a MEMBER of WEA and NEA. Presently, part-time teachers who pay partial MTI dues MUST pay FULL NEA and WEA dues as full members.

7. For any fair-share proposal to take effect it must have the support of a majority of all affected by the contract.

8. The enabling legislation, Senate bill 198A, is constitutional according to our legal advice.

9. The petition being presented is NOT to be construed as anti-MTI. All that is asked is that the present fair-share proposal be deferred this year until adequate study and dissemination of information — and *your* opinion is known.

For communication, not confrontation,

Ralph K. Reed /s/
Ralph Reed
Rm. 111"

See me if you have
additional questions not
covered above.

JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE, AND THE BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT NO. 8, et al, VIII, Decision No. 11271

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Pleadings

In its complaint MTI alleged that, by permitting Holmquist, as an individual employe and as the representative of seventy-two other employes, to attempt to influence the School Board, hereinafter referred to as the Board, on behalf of the District in its decision regarding the issue on the fair-share agreement as proposed by the MTI during bargaining, the District negotiated with an individual employe or a group of employes, and that thereby the Board interfered with and restrained bargaining unit employes in their right to bargain collectively through representatives of their own choosing in violation of Sec. 111.70 (3) (a) 1 of the Municipal Employment Relations Act, hereinafter referred to as MERA, and further, that the Board thereby failed and refused to bargain collectively with MTI in violation of Sec. 111.70 (3) (a) 4 of MERA. MTI would have the Commission order the Board to cease and desist from such activity "now and in the future", and further requests the Commission to order that the Board expunge from its official minutes "any and all references to the remarks" made by Holmquist at the December 6, 1971 meeting of the Board, and further that the Board expunge from its minutes and records "any reference to any written petitions, including such written petitions themselves" received by the Board from Holmquist on December 6, 1971.

In its answer the District contended that Holmquist's remarks made at the Board meeting of December 6, 1971

"involved solely the giving of a position statement at an ordinary meeting of a public body and thus cannot be labeled as negotiating", that Holmquist was not questioned by the Board, and that the Board refrained from any discussion or conversation with Holmquist during and after his statement. The District denied the commission of any prohibited practices and requested that the complaint be dismissed.

The Facts

All the facts dispositive of the issues involved herein are set forth in detail in the Findings of Fact.

The Positions of the Parties

As indicated in the preface of the Commission's decision both the MTI and the District filed briefs./[1] Upon permission from the Commission, briefs amicus were filed by the Wisconsin Education Association and the National Right to Work Legal Defense Foundation. The Commission appreciates the thoroughness and quality of said briefs, and in that regard commends those who prepared same./[2]

The Position of MTI

MTI sets forth two basic arguments in support of its complaint that the District committed the prohibited practices as alleged in the complaint filed herein. It contends that:

1. "In permitting a representative of a minority of its bargaining unit employes to appear at a public meeting of the Board and to speak to the Board on fair share, a mandatory subject of bargaining, the Board

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/[1] MTI also filed a reply brief.

/[2] A review of the record, which refreshes a recollection of the hearing, warrants complimenting Attorney Kelly and Attorney Kops for their attitude, conduct and competency in making the record in the instant matter.

failed and refused to collectively bargain with MTI as the representative of a majority of its employes in violation of Section 111.70 (3) (a) 4, Wis. Stats., and interfered with the right of said bargaining unit employes to collectively bargain through MTI as the representative of their own choosing in violation of Section 111.70 (3) (a) 1, Wis. Stats."

2. "A Municipal Employer cannot base its decision to reject a fair share proposal on a poll of its bargaining unit employes."

In support of its first contention MTI argues that the Board was bound to "deal exclusively" with it as the exclusive representative of its teachers, and that therefore a minority union,/[3] or a minority group of employes,/[4] cannot negotiate with the Board and likewise the Board is prohibited from negotiating either with a minority union or a minority group of employes, and if it does so, the Board violates its duty to bargain with the exclusive bargaining representative.

In said regard MTI argues:

"Holmquist as the representative of a minority of teachers was permitted to discuss with the Board, i.e. to convey to the Board the minority's ideas and thoughts on a mandatory subject of bargaining, and to possibly influence the decision of the Board as concerns such subject. Whether a two-sided conversation took place or not is immaterial. Holmquist as a minority representative was permitted to influence the Board in its decision making role and on a question of conditions of employment. Whether the remarks made by Holmquist did in fact influence the Board in its decision making process is also immaterial. His remarks

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/[3] *Milwaukee Board of School Directors v. WERC*, 42 Wis. 2d 637 (1968)

/[4] *M & M Chevrolet Co.* (4083-A) 4/56

could have had that affect. Indeed a strong inference arises from the facts in this matter that his remarks did so influence the Board in its bargaining position.

Immediately after the public meeting during which such remarks were made, the Board went into executive session. During such session it discussed the unresolved issues of fair share, the issue discussed previously by Holmquist, and arbitration of teacher nonrenewals and dismissals. Up to that time the Board had refused to accept MTI's proposals as concerns either issue. During such discussion the Board changed its position in this regard. Indeed the Board by resolution agreed for the first time to accept binding arbitration of teacher renewals and dismissals and at the same time resolved to reaffirm its position against fair share. In effect the Board to some extent accepted the position proposed by the minority."

In support of its second principal contention MTI argues, in material part, as follows:

"If a majority bargaining representative proposes during negotiations that the parties agree upon a fair share agreement incorporating the same into a written collective agreement, the employer must meet and confer with such majority representative at reasonable times, in good faith, with respect to such conditions of employment, with the intent of reaching an agreement thereon. While the employer is not compelled to agree to any fair share agreement proposed or to make any concession concerning the same, it is required to meet and confer at reasonable times relative to such agreement, in good faith with the intention of reaching agreement. The employer cannot negotiate publicly or privately with a minority as concerns fair share agreements or base its refusal to accept fair share on the premise that a number of bargaining unit teachers do not support a fair share agreement.

The statute does give the employer the right to petition the Commission for a referendum and does provide that such a petition must be supported by proof that at least 30% of the employees in the bargaining unit desire that the fair share agreement be terminated.

The statute therefore clearly permits the employer to receive from its employes, and through other than the majority representative, proof that such employes do not favor the fair share agreement. Obviously the proof may be obtained in unsolicited employe petitions.

When may the employer receive such proof? Certainly not during negotiations when in its decision making role it must decide whether to agree to a fair share proposal or not. It may only receive such information when a fair share agreement is already agreed upon by the employer and the majority bargaining representative and the question is does a majority of the bargaining unit employes favor the continuance of such agreement. ...

ERB 15.06 (of the Commission's rules) entitled "Stipulation for Referendum Seeking Authorization to Implement Fair-Share Agreement" provides that when a municipal employer and the majority bargaining representative of its employes in their negotiations with respect to the inclusion of the fair-share agreement in their collective bargaining agreement, jointly desire to determine whether the employes in the involved collective bargaining unit favor the implementation of a fair-share agreement, such municipal employer and such labor organization, or anyone lawfully authorized to act on their behalf, may file a stipulation for a referendum for said purpose. Such stipulation must contain a statement by the municipal employer that it will incorporate a fair-share agreement into the collective bargaining agreement if the required number of employes vote in favor of implementing such agreement. Conversely, such Stipulation must contain a statement by the labor organization that it agrees to withdraw its request in negotiations for a fair-share agreement in the event the required number of employes do not vote in favor of the implementation of such agreement. Resort to such a stipulation and employe self determination through the election process then can only occur *after* the employer and the majority labor organization have come to agreement on a fair-share agreement.

There simply is no provision allowing or permitting the employer to poll his employes or to accept and consider a written poll of his employes as part of the decision making process in deciding whether to accept or reject a fair-share agreement.

An election may be had, in which employes can approve or disapprove of the continuation of a previously agreed upon fair-share agreement, pursuant to a Petition or a Stipulation. An election may also be had in which employes indicate whether or not they favor the implementation of a fair-share agreement, but only if the employer states in writing that it will incorporate a fair-share agreement into the collective bargaining agreement upon a favorable employe vote.

The employer cannot refuse or reject a fair-share agreement proposed in negotiations basing such refusal on the fact that a number, even a majority, of its bargaining unit employes have disclosed to it orally or in writing that they do not favor fair share.

Chaos would result if the rule were otherwise. If an employer could rely on petitions signed by a substantial minority of its employes or even a majority of its employes as the basis for rejecting fair-share agreements, the secret balloting provision of the election process established by the WERC would be rendered valueless.

A multitude of legal questions could and would arise as to the validity of the signatures on the petition, whether the employes understood what they were signing, whether the petition was unsolicited or whether it was obtained directly or indirectly through improper management persuasion, and so on.

Fair-share agreements simply are not unique subjects of bargaining upon which the employer can bargain with the minority either privately or in public.

In the instant matter the Board permitted Holmquist as the representative of an informal minority of bargaining unit employes to appear at a public meeting of the Board and

to speak against the fair-share arrangements proposed by MTI as the majority bargaining representative. In doing so the Board consciously undermined the bargaining position of MTI as the majority representative of its bargaining unit employes."

The District, in support of its answer that the complaint should be dismissed, in its brief sets forth three basic contentions as follows:

1. The Board in permitting Holmquist to speak and present the petition involved, during an ordinary Board meeting and in the presence of MTI officials, acted within its duty "to recognize and respect the constitutional rights of all its employees to speak freely and petition their government.

2. The Board did not violate its duty to bargain with MTI or interfere with the rights of its employes, when in the presence of MTI officers "it merely listened to a representative of an informal committee of bargaining unit employees during the public appearance portion of a regularly scheduled meeting, read a petition concerning 'fair share' circulated among Madison teachers and heard that 417 teachers had signed the petition".

3. The Board acted "in conformity with its responsibilities under Section 111.70" in listening to Holmquist regarding negotiable matters, receiving information, thoughts or sentiments of employes in the bargaining unit "in the absence of an express or implied desire by the employer to deal directly with the employes and affirmative action soliciting or inducing the employees to deal directly with" the board.

In support of its first argument the District contends that the First Amendment to the federal constitution,[5] as well as Article I, Section 3 of the Wisconsin Constitution, guarantees the right of persons to petition the government or any party thereof, and the right to speak and publish sentiments freely. Therefore the District concludes that all teachers in its employ, as citizens, "possess the right to speak freely and the right to petition" the Board, and that the Board has the responsibility to refrain from obstructing such right.

Secondly the District argues that it recognizes its duty to bargain exclusively with MTI on the issue of a fair share agreement, however, that the Board's action in the meeting involved with respect to listening to Holmquist did not constitute a failure in its duty to bargain with MTI.

In support of its third basic argument the District, in its brief argues, in part as follows:

"There is no evidence in this record that either the Board of Education recognized an obligation or intended to assume an obligation to meet and confer with Mr. Albert Holmquist or his group at reasonable times with an intention of reaching an agreement with those individuals. There is no evidence, expressed or implied, that the Board wished to deal with persons other than the certified representative. Further, there is no evidence to indicate the Board or Administration solicited or induced direct dealing with employees in derogation of the collective bargaining representative. The Board merely received information. Listening is not bargaining.

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[5]Citing Pickering v. The Board of Education, 391 U.S. 563 (1968)

It is also clear Mr. Holmquist's remarks cannot be considered 'collective bargaining' within the statutory definition. Mr. Holmquist merely wished to inform the *bargaining parties* that some teachers were confused about the 'fair-share' proposal presently on the bargaining table. His testimony indicates that he was not interested in establishing a bargaining relationship with the Board of Education. On the contrary, his remarks clearly recognized that Madison Teachers Incorporated was the exclusive bargaining representative for the teachers. His efforts were aimed at getting the bargaining parties off dead center, not undermining the majority representative.

Mr. Holmquist recognized the Board of Education and Madison Teachers Incorporated as the sole bargaining parties for the teachers in the District. Additional support for this suggestion can be seen in the petition itself which was read to the Board. The petition is addressed to Madison Teachers Incorporated and the Board of Education. Transcript Page 94.

The act of the Board of Education in permitting Mr. Holmquist to speak cannot be considered 'collective bargaining' in light of the statutory definition.

Section 111.70 (4) (d) of the Wisconsin Statutes (1971) provides additional support for the Respondent's position that an employer may receive information from and listen to bargaining unit employees concerning bargaining matters without running afoul of its responsibilities under the act.

The only contact between Mr. Holmquist and the Board of Education or the School Administration was in the presence of the officials of the majority representative of the teachers of the District. Indeed, on December 6th, the President, Executive Secretary and Chief Negotiator for Madison Teachers were present in the audience when Mr. Holmquist made his statement. The statute safeguards the right of an employee to communicate with an employer. In this case the Board merely listened and, in so doing, allowed what is declared lawful by statute.

Finally, the legislature has provided a procedure by which a union security agreement entitled 'Fair-Share' may be terminated. Section 111.70 (2) Wisconsin Statutes (1971). This procedure may be initiated by an employer or a labor organization upon a 30% showing of interest by the employees in the bargaining unit. This section thus assumes that unsolicitated information from employees concerning 'fair-share agreements' may be received after an agreement on fair-share by the parties. It thus further assumes that receipt of information by the employer after an agreement from dissenting members of the bargaining unit is not 'bargaining' or 'negotiating' with third parties.

The Complainant argues that this legislative enactment merely allows the receipt of information from employees after agreement and, therefore, does not presume that an employer may receive information prior to agreement on fair-share. However, the Complainant misses the point of the argument. Complainant's argument suggests that the receipt of information on negotiable matters from employees prior to the agreement is bargaining while receipt of information after agreement with the bargaining representative is not bargaining. He presumes that the legislature would allow bargaining by third parties after an agreement had been reached but prevent bargaining by third parties before an agreement was reached. This argument does not make sense.

It is more consistent with the intent of the act to suggest that the legislature understood that the mere receipt of information is not 'bargaining' prior to or after a collective bargaining agreement is reached and thus, it established a procedure where it is presumed the employer will receive information. The Complainant's argument suggests that the legislature would sanction activity considered direct bargaining after an agreement was reached but prohibited activity considered direct bargaining before agreement. The Respondent suggests the legislature understood listening and receiving information is not bargaining."

In support of its argument that an employer may receive information concerning bargaining matters from employes and discuss matters of collective bargaining with employes and listen to negative information "about the majority representative without violating its duty to bargaining and without interfering with the bargaining rights of its employes", the District cites a number of decisions of the National Labor Relations Board. [6/]

Further, the District would distinguish the instant events from the applicability of Wisconsin Supreme Court's decision in *Milwaukee Board of School Directors, supra*, contending that the Board meeting of December 6th was "an ordinary meeting of the Board" and not "a public bargaining session or the meeting at which the Board was to take final action on the Negotiated Agreement with the majority representative". In addition the District contends that herein Holmquist merely gave a position statement, and that the "Supreme Court suggested that under these circumstances it would have some difficulty in labeling the conduct 'negotiating' ", and therefore not violative of the Act.

The District contends "to suggest that a municipal employer must stifle a minority organization would obviously be action that would discourage membership in a minority organization and encourage membership in the majority union, a clear violation of Section 111.70(3) (a)3 of the Wisconsin Statutes."

Finally, the District argues that Article II, 2 of the collective bargaining agreement existing between the parties contemplated the activity involved herein.

[6/] *White Sulphur Springs Co.* CA DC (1963) 316 F. (2d) 410; *Lawn Boy Div. Outboard Marine Corp.*, 143 NLRB 535, (1963); *Baldwin County Electric Membership Corp.*, 145 NLRB 1316 (1964); *Coast Broadcasting Corp.*, 151 NLRB No. 117 (1965); *American Printing Co.*, 173 NLRB No. 17 (1968); *Tobasco Concrete Co.*, 177 NLRB No. 101 (1965)

In its brief amicus the National Right to Work Legal Defense Foundation supports the argument of the District that to require the Board to "stifle the speech of a teacher removes the constitutional protection for freedom of expression"; that the *Milwaukee Board of School Directors case* is distinguishable from the instant matter, contending that Holmquist's remarks "cannot be interpreted as negotiation"; that there is no evidence that the Board was motivated to undermine the MTI as the certified bargaining representative; and that Sec. 111.70(4) (d) 1 protects the right of individual employes to present grievances.

In its reply brief MTI contends that had the Board denied Holmquist the opportunity to speak it would not have infringed upon or abridged Holmquist's right of free speech, since "freedom of speech" cannot be used to engage in conduct constituting a refusal to bargain in good faith with MTI as the exclusive bargaining representative.

With respect to the District's argument that federal cases support a conclusion that in permitting Holmquist to speak the Board did not fault its duty to bargain with MTI, the latter argues that the cases cited by the District are not in point, but, on the contrary, the factual situations therein are distinguishable from those in the instant proceeding. MTI attacks the District's contention that the Board acted in conformity with its responsibilities under MERA in listening to bargaining unit employes on negotiable matters or discusses such matters with employes in the absence of the bargaining representative in the absence of an expressed or implied desire "to deal directly with the employes and affirmative action soliciting or inducing employes to deal directly" with the Board. MTI argues that a finding of prohibited interference does not require a finding of anti-union animus. [7/]

[7/] *City of Milwaukee* (8420) 2/68

Further, MTI contends that the total conduct of the Board's agents, including the permitting of the distribution of letters to teachers through teacher mailboxes, the circulation of the petition in the school buildings, all with the permission of the principals involved, permitting Holmquist to speak at the Board meeting, and the timing of the Board's final offer, are supportive of a conclusion that the Board committed prohibited practices as alleged.

In reply to the defense that the Board's action with respect to the receipt of the petition was consistent with Article II, 2 (d) of the collective bargaining agreement between the parties, MTI replies as follows:

> "Section 2 (c) makes it crystal clear that matters which are the proper subject of negotiations are to be dealt with by the authorized agents and only the authorized agents of the respective parties. It is improper for a principal to the agreement on the one side and a group which is neither principal nor agent, on the other side, to discuss matters which are proper subjects of negotiation. Neither party in such a discussion is properly taking part in such discourse. Any such action, by the express terms of Article II 2 (c), is in direct violation of the Agreement.
>
> Article II 2 (d) simply makes it clear that each party has the duty to bring to the attention of the other any such deviation from the proper negotiating process. If others than an authorized party should bring matters, which are the proper subject of negotiations, to one of the parties to the Agreement, such party has the duty to promptly notify the other party of that fact so that any problems caused by such improper conduct may be quickly resolved. Section 2 (d) provides a procedure to remedy improper activity in negotiations; its purpose is not to provide a vehicle to admit unauthorized parties into the negotiation process.
>
> When paragraphs 2 (c) and 2 (d) of Article II (A) of the Negotiated Agreement, entitled 'Conference and Negotiation' are read together, as they must be, it is clear that the Negotiated Agreement does not support the position advanced by the Respondent."

In response to the Board's contention that the receipt by the Board of a showing of interest opposing a fair share agreement does not constitute bargaining or negotiation, MTI contends that MERA does not permit a municipal employer to accept or consider a written poll of its employes as part of its decision with respect to the acceptance or rejection of a proposal with respect to a fair share agreement, since the statute does not require any balloting of employes prior to the implementation of a fair share agreement, and that a showing of interest executed by at least 30% of the employes in the unit is necessary only to initiate a vote to determine whether an existing fair share agreement should be continued.

Finally, the MTI contends that Holmquist's appearance and remarks before the Board cannot be considered a grievance as contemplated in Sec. 111.70 (4) (d) of the Act.

The Wisconsin Education Association, in its brief amicus, supports MTI's argument that a ruling that the Board violated its duty to bargain would not abridge Holmquist's constitutional rights; that anti-union animus need not be established to find a refusal to bargain in good faith; and that the only real issue herein involves whether the receipt of Holmquist's communication constitutes a violation of the Board's duty to bargain only with the exclusive representative. In that regard the WEA contends:

> "Holmquist told the Board what it wanted to hear, what it hoped would have a negative influence on the union's bargaining position. Would the Board have been as anxious to hear a speaker in opposition to Holmquist, or ten speakers, or 1,200 speakers? Would it care to hear 1,200 speakers on each of the 13 unresolved items that were then on the table? Would it care to hear 1,200 speakers on all of the items that were originally put on the table? And if 1,200 speakers is distinguishable from one speaker by virtue of their numbers, where would the line be drawn? The 'obligation to treat with the true representative ... and the

negative duty to treat with *no* other' [8] was a wise statutory policy. It has stood the test of time.

Because of the wisdom of the policy and because of the havoc that the opposite could wreak on collective bargaining as a successful institution, all dealings outside of the recognized representative should be discouraged. In applying the term 'bargaining' to fact situations, it should be given broad construction to include everything but the most insubstantial, innocuous, and indeed unplanned communication between employers and employees. It should certainly include situations such as the present one where:

1. It related specifically to a demand the union had on the table;
2. it involved not a person speaking only as an individual, but rather as a representative;
3. it was preceded by planning and effort to gain support from other employees;
4. it was presented in a formal way at a meeting of the Board with all members present;
5. it was specifically intended to influence the Board in its dealings with the Union.

A contrary ruling in a case such as this would only be a formal invitation to dissident employees to address their employers on wages, hours, and conditions of employment. It would be an invitation to unions to stack employer's meetings with loyalists to defend their bargaining positions. It could make a mockery and a shambles out of collective bargaining."

Discussion

There are four basic issues which the Commission must determine herein. They are as follows:

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[8] *NLRB v. Jones & Laughlin Steel Corp.* 501 U.S. 1 (1937)

1. Would the Board have violated Holmquist's right of constitutional free speech by denying him the opportunity to speak and orally present the petition involved?

   If the Commission finds in the negative on Issue 1;

2. In permitting Holmquist to speak and orally present the petition, did the Board violate its statutory duty to bargain with MTI as the exclusive collective bargaining representative?
3. Does Article II, A of the collective bargaining agreement permit the activity involved without affecting the Board's duty to bargain?
4. Does the fact that Holmquist's presentation before the Board related to MTI's fair share proposal affect the Board's duty to bargain?

Issue 1

Holmquist appeared and orally presented the petition involved to the Board, not as an agent of MTI, the exclusive collective bargaining representative, but as a claimed representative of a minority of teachers who were opposed to the Board's granting of a fair share agreement. Our Supreme Court in *Milwaukee Board of School Directors, supra,* rejected the contention that prohibiting a representative of a minority union to speak before the school board, while the latter had not completed its negotiations with the majority organization, violated the constitutional rights of said minority representative.[9] We see no distinction in the fact that Holmquist did not represent a "minority organization". He did in fact represent a minority of the teachers, whose views were opposed to those of MTI with respect to a fair share agreement.

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[9] The Court reversed the Commission's conclusion in said regard.

Therefore we conclude that the Board would not have violated Holmquist's constitutional right of free speech by denying him the opportunity to speak and orally present the petition involved.

Issue 2

In *Milwaukee Board of School Directors, supra,* the school board involved, on two separate occasions denied a representative of a minority organization the opportunity to speak at its open meeting. In said case our Supreme Court stated ".... if the minority union representative is permitted to influence the decision of the school board by his argument, then he is truly negotiating". Holmquist intended to influence the Board on the fair share issue. His statement is clear to that matter. After the public meeting the members of the Board went into executive session, returned and announced its offer to the MTI representatives, which rejected a fair share agreement. Whether the Board rejected the fair share proposal as a result of, or not a result of, Holmquist's remarks, is not necessary for the Commission to determine. The fact is that Holmquist's motive and purpose was intended to persuade the Board not to agree to the fair share agreement as proposed by the exclusive collective bargaining representative. The Board's activity with respect to the Holmquist incident, which occurred during the Board's open meeting, constituted an erosion of its duty to bargain exclusively with the MTI and with no other organization, group of employes, or a single employe. The cases cited by the District in its brief are not applicable to the circumstances involved in the instant proceeding.

Issue 3

Article II A. d. of the collective bargaining agreement existing between the parties at the time of the event involved, in our opinion, does not "legalize" the Board's activity with respect to Holmquist's remarks to the Board at its open meeting. The provision involved, when viewed in context with subpara c. of

the Article, indicates that the Board and MTI agreed that negotiable subjects may only be negotiated by the Board and the MTI, even though such matters may be brought to the attention of either the Board or MTI. Various supervisory personnel of the Board were aware of Holmquist's activity prior to the open meeting. He could have properly presented his petition to the Board by means other than an appearance at the open Board meeting. If that would have occurred the Board was contractually obligated to immediately inform MTI thereof. Even if the Board members were not aware of Holmquist's intentions at the open meeting, prior to his remarks an inquiry should have been made as to the intent and purpose for which he sought to speak. Had he indicated the purpose of his appearance and remarks, the Board should have denied him recognition and informed him to submit a written statement to both the Board and MTI. Perhaps the recognition of Holmquist and the receipt of his oral statement was not motivated by any anti-union animus on behalf of the Board, nevertheless by so doing the Board did not fulfill its statutory duty to bargain in good faith with the MTI as the exclusive collective bargaining representative.

Issue 4

The pertinent portion of Sec. 111.70(2) of MERA material to this particular issue reads as follows:

> "... except that employes may be required to pay dues in the manner provided in a fair-share agreement. Such fair-share agreement shall be subject to the right of the municipal employer or a labor organization to petition the commission to conduct a referendum. Such petition must be supported by proof that at least 30% of the employes in the collective bargaining unit desire that the fair-share agreement be terminated. Upon so finding, the commission shall conduct a referendum. If the continuation of the agreement is not supported by at least the majority of the eligible employes, it shall be deemed terminated. ..."

We do not agree with MTI that the statute does not permit an employer to accept or consider a written poll of its employes as part of its decision to accept or reject a fair share proposal. The statute permits the implementation of a fair share agreement without a referendum among the employes authorizing same. After the implementation of a fair share agreement, either the employer or a labor organization may file a petition for a referendum to determine whether the employes involved desire the continuation of the fair share agreement. Such a petition must be supported by a showing of interest of at least 30% of the employes in the unit involved. There is nothing in the statute which prohibits an employer from receiving a showing of interest opposing the fair share agreement prior to the implementation of a fair share agreement. The rules of the Commission provide for a stipulation requesting a referendum prior to implementation of a fair share agreement, provided therein the employer agrees to implement same should the required number of employes favor same, and, further, providing the union involved agrees to withdraw its fair share proposal should the required number of employes not vote in favor thereof./[10]

The presentation of a showing of interest by the employes may very well have an impact on whether the parties will execute such a stipulation. And if so, the results of the referendum would be binding, and thus stabilize any possible issue with respect to the implementation of a fair share agreement. If the employes vote in favor of a fair share agreement, and such an agreement is implemented following the referendum, pursuant to the rules of the Commission, [11]/ an isolation period for the conduct of a subsequent referendum is established, thus further stabilizing the collective bargaining relationship.

/[10]ERB 15.03

/[11]ERB 15.11 (2) (c)

However, in the instant proceeding, the manner in which the Board received the "showing of interest", namely permitting Holmquist to speak on a bargaining issue at an open Board meeting, exceeded the bounds of permissable conduct with reference to the receipt of a showing of interest requesting the conduct of a referendum, either seeking an initial referendum or, assuming an existing fair share agreement, a subsequent referendum.

Conclusion

In accordance with the above rationale the Commission has concluded that the District, by its Board, committed prohibited practices as alleged in the complaint. The Commission does not deem it necessary to effectuate the policy of MERA to require the Board to expunge from its official minutes any references therein relating to the appearance and remarks of Holmquist at the December 6, 1971 meeting. However, it has ordered the School Board to incorporate the Commission's decision in its official minutes.

Dated at Madison, Wisconsin, this *13th* day of September, 1972.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

By *Morris Slavney /s/*
Morris Slavney, Chairman

Zel S. Rice II /s/
Zel S. Rice II, Commissioner

Jos. B. Kerkman /s/
Jos. B. Kerkman, Commissioner

(DENIAL of Rehearing)

No. 410

August Term, 1974

STATE OF WISCONSIN: IN SUPREME COURT
CITY OF MADISON
JOINT SCHOOL DISTRICT NO. 8 et al.
Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION.
Respondent.

MADISON TEACHERS INCORPORATED,
Intervenor Respondent.

Per Curiam. Motion for rehearing denied without costs

Date entered: September 30, 1975

IN THE SUPREME COURT OF THE
STATE OF WISCONSIN

August Term 1974 No. 410

CITY OF MADISON,
JOINT SCHOOL DISTRICT NO. 8, et al.,
Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent,

MADISON TEACHERS, INCORPORATED,
Intervenor Respondent

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that the CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG, BURKE AND WESTPORT AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8, appellants above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Wisconsin, affirming the judgment of the Dane County Circuit Court which affirmed the order of the Wisconsin Employment Relations Commission, entered in this action on September 30, 1975.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

Dated December 5, 1975.

/s/ Henry A. Gempeler
Henry A. Gempeler
City Attorney

/s/ Gerald C. Kops
Gerald C. Kops
Deputy City Attorney

Attorneys for Appellants

The notice of Appeal was filed with the Wisconsin Supreme Court December 5, 1975

111.70 Municipal employment. (1) DEFINITIONS. As used in this subchapter:

(a) "Municipal employer" means any city, county, village, town, metropolitan sewerage district, school district, or any other political subdivision of the state which engages the services of an employe and includes any person acting on behalf of a municipal employer within the scope of his authority, express or implied.

(b) "Municipal employe" means any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employe.

(c) "Commission" means the employment relations commission.

(d) "Collective bargaining" means the performance of the mutual obligation of a municipal employer through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The

employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter.

(e) "Collective bargaining unit" means the unit determined by the commission to be appropriate for the purpose of collective bargaining.

(f) "Craft employe" means a skilled journeyman craftsman, including his apprentices and helpers, but shall not include employes not in direct line of progression in the craft.

(g) "Election" means a proceeding conducted by the commission in which the employes in a collective bargaining unit cast a secret ballot for collective bargaining representatives, or for any other purpose specified in this subchapter.

(h) "Fair-share agreement" means an agreement between a municipal employer and a labor organization under which all or any of the employes in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employes affected by said agreement and to pay the amount so deducted to the labor organization.

(i) "Labor dispute" means any controversy concerning wages, hours and conditions of employment, or concerning the representation of persons in negotiating, maintaining, changing or seeking to arrange wages, hours and conditions of employment.

(j) "Labor organization" means any employe organization in which employes participate and which exists for the purpose, in whole or in part, of engaging in collective bargaining with municipal employers concerning grievances, labor disputes, wages, hours or conditions of employment.

(k) "Person" means one or more individuals, labor organizations, associations, corporations or legal representatives.

(l) "Professional employe" means:

1. Any employee engaged in work:

a. Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;

b. Involving the consistent exercise of discretion and judgment in its performance;

c. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;

d. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical process; or

2. Any employe who:

a. Has completed the courses of specialized intellectual instruction and study described in subd. 1. d;

b. Is performing related work under the supervision of a professional person to qualify himself to become a professional employe as defined in subd. 1.

(m) "Prohibited practice" means any practice prohibited under this subchapter.

(n) "Referendum" means a proceeding conducted by the commission in which employes in a collective bargaining unit may cast a secret ballot on the question of authorizing a labor organization and the employer to continue a fair-share agreement. Unless a majority of the eligible employes vote in favor of the fair-share agreement, it shall be deemed terminated and that portion of the collective bargaining agreement deemed null and void.

(o) "Supervisor" means:

1. As to other than municipal and county firefighters, any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employes, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

2. As to firefighters employed by municipalities with more than one fire station, the term "supervisor" shall include all officers above the rank of the highest ranking officer at each single station. In municipalities where there is but one fire station, the term "supervisor" shall include only the chief and the officer in rank immediately below the chief. No other firefighter shall be included under the term "supervisor" for the purposes of this subchapter.

(2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement. Such fair-share agreement shall be subject to the right of the municipal employer or a labor organization to petition the commission to conduct a referendum. Such petition must be supported by proof that at least 30% of the employes in the collective bargaining unit desire that the fair-share agreement be terminated. Upon so finding, the commission shall conduct a referendum. if the continuation of the agreement is not supported by at least the majority of the eligible employes, it shall be deemed terminated. The commission shall declare any fair-share agreement suspended upon such conditions and for such time as the commission decides whenever it finds that the labor organization involved has refused on the basis of race, color, creed or sex to receive as a member any employe of the municipal employer in the bargaining unit involved, and such agreement shall be made subject to this duty of the commission. Any of the parties to such agreement or any municipal employe covered thereby may come before the commission, as provided in s. 111.07, and ask the performance of this duty.

(3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:

1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

2. To initiate, create, dominate or interfere with the formation or administration of any labor or employe

organization or contribute financial support to it, but the employer shall not be prohibited from reimbursing its employes at their prevailing wage rate for the time spent conferring with the employes, officers or agents. Supervisors may remain members of the same labor organization of which their subordinates are members, but such supervisor shall not participate in determinations of the collective bargaining policies of such labor organization or resolution of grievances of employes. After January 1, 1974, said supervisors shall not remain members of such organizations.

3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement.

4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

6. To deduct labor organization dues from an employe's or supervisor's earnings, unless the municipal employer has been presented with an individual order therefore, signed by the municipal employe personally, and terminable by at least the end of any year of its life or earlier by the municipal employe giving at least 30 days' written notice of such termination to the municipal employer and to the representative organization, except where there is a fair-share agreement in effect.

(b) It is a prohibited practice for a municipal employe, individually or in concert with others:

1. To coerce or intimidate a municipal employe in the enjoyment of his legal rights, including those guaranteed in sub. (2).

2. To coerce, intimidate or induce any officer or agent of a municipal employer to interfere with any of its employes in the enjoyment of their legal rights, including those guaranteed in sub. (2), or to engage in any practice with regard to its employes which would constitute a prohibted practice if undertaken by him on his own initiative.

3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is the recognized or certified exclusive collective bargaining representative of employes in an appropriate collective bargaining unit. Such refusal to bargain shall include, but not be limited to, the refusal to execute a collective bargaining agreement previously agreed upon.

4. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them.

5. To coerce or intimidate an independent contractor, supervisor, confidential, managerial or executive employe, officer or agent of the municipal employer, to induce him to become a member of the labor organization of which employes are members.

(c) It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employes, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par (a) or (b).

(d) Nothing in this subchapter shall preclude law enforcement or firefighting supervisors from organizing separate units of supervisors for purposes of negotiating with their municipal employers. The commission shall by rule establish procedures for certification of such units of supervisors and the levels of supervisors to be included. The commission may require that the representative in a supervisory unit shall be an organization that is a separate local entity from the representative of the employes but such requirement shall not prevent affiliation by a supervisory representative with the same parent state.

(4) POWERS OF THE COMMISSION. The commission shall be governed by the following provisions relating to bargaining in municipal employment in addition to other powers and duties provided in this subchapter:

(a) *Prevention of prohibited practices.* Section 111.07 shall govern procedure in all cases involving prohibited practices under this subchapter except that wherever the term "unfair labor practices" appears in s. 111.07 the term "prohibited practices" shall be substituted.

(b) *Failure to bargain.* Whenever a dispute arises between a municipal employer and a union of its employes concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for a declaratory ruling. The decision of the commission shall be issued within 15 days of submission and shall have the effect of an order issued under s. 111.07. The filing of a petition under this paragraph shall not prevent the inclusion of the same allegations in a complaint involving prohibited practices in which it is alleged that the failure to bargain on the subjects of the declaratory ruling is part of a series of acts or pattern of conduct prohibited by this subchapter.

(6) DECLARATION OF POLICY. The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter.

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U. S.
FILED
MAY 14 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. — 75-946

CITY OF MADISON,
JOINT SCHOOL DISTRICT No. 8,
CITY OF MADISON,
VILLAGES OF MAPLE BLUFF
AND SHOREWOOD HILLS,
TOWNS OF MADISON,
BLOOMING GROVE, FITCHBURG AND
BURKE AND ITS AGENT THE
BOARD OF EDUCATION,
CITY OF MADISON
JOINT SCHOOL DISTRICT No. 8
Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION and MADISON
TEACHERS INCORPORATED.
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Jurisdictional Statement Filed January 5, 1976.
Probable Jurisdiction Noted March 1, 1976.

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 6, 1972 — Complaint filed with WERC by Madison Teachers Incorporated.

January 10, 1972 — Notice of Hearing of February 17, 1972.

February 9, 1972 — Answer filed with WERC on behalf of City of Madison and its Agent Board of Education.

February 16, 1972 — Notice of Postponement of Hearing.

September 13, 1972 — Findings of Fact Cconclusions of Law, Order, Appendix and Memorandum Accompanying Findings of Fact, Conclusions of Law and Order of the WERC.

October 13, 1972 — Petition for Review of WERC Decision by Dane County Circuit Court.

November 28, 1972 — Notice of Appearance and Statement of Position of Intervenor Respondent Madison Teachers Incorporated in Dane County Circuit Court.

December 5, 1972 — Notice of Appearance and Statement of Position of Wisconsin Employment Relations Commission in Dane County Circuit Court.

December 8, 1972 — Notice of Appearance and Statement of Position of National Right to Work Legal Defense Foundation in Dane County Circuit Court.

December 8, 1972 — Petition for Permission to file an Amicus Curiae Brief by the National Right to Work Legal Defense Foundation.

October 5, 1973 — Memorandum Decision of the Dane County Circuit Court dated October 2, 1973.

October 12, 1973 — Judgment of Dane County Circuit Court.

October 19, 1973 — Notice of Entry of Judgment.

November 9, 1973 — Notice of Appeal of Judgment of Dane County Circuit Court to Wisconsin Supreme Court.

June 30, 1975 — Opinion of Wisconsin Supreme Court filed and Judgment of Wisconsin Supreme Court entered affirming the Judgment of the Circuit Court.

July 18, 1975 — Motion for rehearing by Appellants filed in Wisconsin Supreme Court.

September 30, 1975 — Per Curiam Decision of Wisconsin Supreme Court filed denying motion for rehearing.

December 5, 1975 — Notice of Appeal to Supreme Court of United States filed in Wisconsin Supreme Court.

December 15, 1975 — Motion for extension of time to Docket Appeal.

December 24, 1975 — Order granting extension of time to Docket Appeal.

January 5, 1976 — Jurisdictional Statement filed in United States Supreme Court.

January 12, 1976 — Waiver of Right to Participate filed by Attorney General of State of Wisconsin.

March 1, 1976 — Probable Jurisdiction noted.

March 26, 1976 — Application for Extension of Time to File Briefs and Single Appendix.

March 30, 1976 — Order granting extension of time to file Appellants brief and Single Appendix.

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS, INC.
Complainant,

v.

JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE, AND THE BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT NO. 8, et al.
Respondent.

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COMPLAINT

The Complainant above named complains that the Respondent has engaged in and is engaging in unfair labor practices contrary to the provisions of Chapter 111 of the Wisconsin Statutes, and in that respect alleges:

1. Complainant, Madison Teachers, Inc. (hereinafter MTI) is a labor organization as defined in Section 111.70 (1) (j), Wis. Stats., having its principal office at 121 South Hancock Street, Madison, Wisconsin, 53703, and at all times pertinent hereto was the certified exclusive collective bargaining representative of all regular full-time and regular part-time certificated teaching personnel employed by the respondent District, including psychologists,

psychometrists, social workers, attendants and visitation workers, work experience coordinator, remedial reading, University Hospital teacher, trainable group, librarians, guidance counsellors, teaching assistant principals (except at Sunnyside School), and teachers on leave.

2. Respondent, Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke (hereinafter the "District") is a City School District operating under Subchapter II of Chapter 120 Wisconsin Statutes, and is a Municipal Employer as defined in Section 111.70 (1) (a), Wis. Stats., with its principal office located at 545 West Dayton Street, Madison, Wisconsin 53703.

3. Respondent, Board of Education of the District, is an agent of the District and is charged with the possession, care, control and management of the property and the affairs of the District.

4. Conferences and Negotiations between the MTI and the Board concerning wages, hours and conditions of employment of bargaining unit teachers for calendar year 1972 commenced on the 25th day of January, 1971, and continued to the 14th day of December, 1971 when full agreement between these parties was reached.

5. During said conferences and negotiations the MTI proposed that the parties adopt a Fair Share Agreement as defined in Section 111.70 (1) (h), Wis. Stats. (1971), and a mandatory subject of bargaining. No agreement was reached by the parties concerning Fair Share until the 14th day of December, 1971 at which time the MTI agreed to withdraw its bargaining demand theretofore made for a fair share agreement.

6. A regularly scheduled public meeting of the Board was held on December 6, 1971. During the course of such meeting the Board permitted Mr. Albert M. Holmquist, a teacher employed by the Board, who is not a member of the MTI, to speak to the Board against the adoption of a fair share agreement despite the fact that Holmquist prefaced his remarks by informing the Board he was a teacher employed by the Board and that he spoke to the Board as the representative of seventy-two teachers employed in forty-nine different school buildings. Holmquist was permitted by the Board to argue against the adoption of a fair share agreement, urging a year's delay in any decision on the MTI's proposal for a fair share agreement, and that all teachers should be polled on the issue and the results of such poll made public.

22 7. Holmquist further presented to the Board written petitions signed by such teachers urging a year's delay in any such decision by the Board which the Board received and accepted.

8. By permitting Holmquist as an individual employee and as the representative of seventy-two of its employees to attempt to influence its decision as concerns a mandatory subject of bargaining the Board negotiated as concerns a question of wages, hours and conditions of employment and a mandatory subject of bargaining with individual employees or groups of employees.

9. By such conduct the Board interfered with and restrained its bargaining unit employees in their right to bargain collectively through representatives of their own choosing in violation of Section 111.70 (2), Wis. Stats. (1971). All in violation of Section 111.70 (3) (a) (1), Wis. Stats. (1971).

10. By such conduct the Board failed and refused to bargain collectively with the MTI as representative of a majority of its employees in violation of Section 111.70 (3) (a) (4), Wis. Stats. (1971).

WHEREFORE complainants pray that an order issue requiring the respondents to:

1. Cease and desist from:

   a) negotiating now and in the future as concerns questions of wages, hours and conditions of employment with individual employees or groups of employees.

   b) interfering with and restraining its bargaining unit employees in their right to bargain collectively through representatives of their own choosing.

2. Take the following affirmative action to effectuate the policies of Section 111.70, Wis. Stats.

   a) Expunge from the official minutes of the December 6, 1971 meeting of the Board of Education, any and all reference to the remarks of Albert M. Holmquist.

   b) Expunge from the official minutes and records of the School District any reference to any written petitions, including such written petitions themselves received by the Board from Albert M. Holmquist on December 6, 1971.

Dated at Madison, Wisconsin, this *5th* day of January, 1971.

/s/ John A. Matthews
John A. Matthews

Subscribed and sworn to before me
this *5th* day of January, 1972.

/s/ Robert C. Kelly
Notary Public, Dane County, Wisconsin
My commission is permanent.

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ANSWER

[Caption omitted in printing]

The Respondents above-named deny that they have engaged in or are engaging in unfair labor practices contrary to the provisions of Chapter III of the Wisconsin Statutes and answering the Complaint in that respect allege:

I

1. Respondents admit the allegations contained in Paragraphs 1, 2, 3, 4, and 5 of the Complaint.

2. The Respondents admit the following portions of Paragraph 6 of the Complaint:

   a. A regularly scheduled public meeting of the Board of Education was held on December 6, 1971.

   b. The Board permitted Mr. Albert M. Holmquist, a teacher employed by the Board, who is not a member of Madison Teachers, Inc., to speak during the public appearance portion of the regular meeting of December 6, 1971.

   c. Mr. Holmquist was allowed to speak at the Board meeting, however, Respondents deny his remarks were addressed solely to the Board.

d. The statement of position of Mr. Holmquist concerned the fair share agreement.

e. Mr. Holmquist prefaced his remarks by informing the Board he was a teacher employed by the Board.

f. Mr. Holmquist prefaced his remarks by stating he was a representative of an informal committee of 72 teachers in 49 schools and wished to inform the Madison Board of Education as he already had Madison Teachers, Inc. about the results of an informal survey regarding one of the 13 or so items then on the conference table and one of the main items that will certainly be included in some form in the new package.

3. The Respondents deny that they permitted Mr. Holmquist to argue against the adoption of a fair share agreement, urging a years delay in any decision on the Madison Teachers Inc.'s proposal for a fair share agreement, and that all teachers should be polled on the issue and that the results of such poll be made public and allege that Mr. Holmquist merely read a petition directed to Madison Teachers, Inc. and the Board of Education and informed the Board of the results of the petition.

4. The Respondents deny the allegations contained in Paragraphs 7, 8, 9, and 10 of the Complaint.

II.

And for a defense to this action, Respondent alleges:

5. On information and belief, Mr. Holmquist is not a minority union member or representative.

6. The remarks of Mr. Holmquist involved solely the giving of a position statement at an ordinary meeting of a public body and thus cannot be labeled as negotiating.

7. Mr. Holmquist was not questioned by the Board of Education during or after his statement.

8. The Board of Education refrained from any discussion or conversation with Mr. Holmquist during and after his statement.

WHEREFORE, the Respondents pray that the Complaint be dismissed.

Dated at Madison, Wisconsin this *8* day of *February*, 1972.

/s/ Douglas S. Ritchie

Subscribed and sworn to before me
this *8* day of *February*, 1972

/s/ Gerald C. Kops
Notary Public, State of Wisconsin
My Commission: *is Permanent*

* * *

PROCEEDINGS BEFORE THE WERC
February 28, 1972

[2] * * *

MR. KELLY: Yes, sir. The Complainant would move to amend paragraph 7 of the Complaint to allege that Mr. Holmquist did not, at that time, present written petitions to the Board, nor did the Board receive or accept any petitions. But, however, Mrs. Doyle, as President of the Board, spoke of the petitions and asked if she could have them and they indicated they would be received by the Board at a later date.

* * *

[5] First, I also move to dismiss because, even assuming that everything occurred in the Complaint and is true, to deny a teacher the opportunity to speak at a public meeting would deny the teacher of her civil rights as guaranteed by the U.S. Constitution, the Wisconsin Constitution and Section 111.70.

* * *

MR. KELLY: We would submit as a joint Exhibit, Joint Exhibit No. 1 by stipulation, the minutes of the Board of Education meeting held on December 6, 1971.

(Document marked for identification as Joint Exhibit No. 1 and was received in evidence.)

[6] MR. KOPS: This is marked as Joint Exhibit No. 2. This is the first page of the agenda for the Board of Education meeting of December 6, 1971.

MR. KELLY: Joint Exhibit No. 3 is the collective bargaining agreement which was in effect from January 1, 1971 through December 31, 1971 between the Complainant Association and the School Board.

(Documents marked for identification as Joint Exhibit No. 2 and Joint Exhibit No. 3 and were received in evidence.)

[7] * * *

It is the Complainant's position, by permitting Mr. Holmquist to speak, and speak as a representative of seventy-two teacher employes in forty-nine schools on fair share, a mandatory subject of collective bargaining, the Board violated its statutory obligations to collective bargaining and it, indeed, interferred, coerced and restrained employes in the right to be represented by a labor organization of their choosing.

* * *

MR. JOHN A. MATTHEWS having been called as a Witness by Counsel for the Complainant and having been duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION OF MR. JOHN A. MATTHEWS BY MR. KELLY:

Q Would you state your name for the record, please?

A John Matthews. I'm Executive Director of Madison Teachers, Incorporated. I live at 4806 Academy Drive, Madison.

Q And what are your duties as Executive Secretary of MTI, Mr. Matthews?

A Prepare the official documents for the corporation and act as liaison for the corporation.

[8] Q Do you involve yourself in collective bargaining?

A Yes, I've been a member of the negotiations team since 1968.

Q Were you involved in the collective bargaining that led to a collective bargaining agreement for the calendar year, 1972?

A Yes, I was.

Q And were you aware of any proposals, or a proposal that may have been submitted to the collective bargaining table during that period of time?

A Yes, I prepared the documents.

Q Was there an original proposal submitted to the Board of Education?

A Yes, we exchanged proposals with the Board according to our contract on or about January 2nd, and in 1971 we submitted our proposal in writing to the Board by

letter to the President, Mrs. Doyle, on January 25, 1971.

Q Did that original proposal contain any reference to fair share?

A Yes, it did.

Q And what was that reference?

A We had proposed, knowing of the pending legislation, that the fair share agreement be instituted between the parties and that, I believe, was item number eighteen in our proposal.

* * *

Q I show you what's been marked as Union Exhibit No. 4, which purports to be a letter on the letterhead of Madison Teachers, Incorporated, signed by Mr. Waldman, addressed to Mrs. Ruth Doyle, President of the Board of Education, and ask you if you can identify it?

A This is a letter of transmittal which was submitted with our [9] proposal for bargaining in 1971 for the 1972 contract.

Q I show you what has been marked as Exhibit No. 5 which purports to be a page of proposals and ask you if you can identify that?

A This would be a copy that was taken from my work copy of our proposal which contains the language for the proposed fair share agreement.

* * *

CHAIRMAN SLAVNEY: All right. Exhibits No. 1 through No. 5 will be received.

* * *

[10]Q Did there come a time when your proposal on fair share was changed?

A We changed it, I believe, twice during the bargaining process. We were watching Assembly Bill 198 as it proceeded.

Q When did you change it the first time?

A I believe in October — October 4, 1971.

Q And what were the changes, substance, at that time?

A We attempted to incorporate some of the language as we were following the bill and finally we drafted some changes as to how the fair share would be collected. We had originally based our proposal on language that was not in conformance with the proposed revision of the Statute.

Q When did the second change occur, sir?

A I believe in November.

Q What was that change, in substance?

A We had it drafted following the passage of 198A so that it would conform to that Statute as it amended 111.70.

* * *

(Documents marked for identification as Union Exhibit No. 6 and Union Exhibit No. 7.)

* * *

Q Mr. Matthews, I show you what's been marked as Union Exhibit No. 6 which is headed "Madison Teachers Incorporated, New or Revised Proposal, October 4, 1971" and ask if you can identify that?

A This was the counter-proposal that we submitted to the Board on October 4th. However, on the date we gave it to the Board of Education Negotiation Team, I should point out that there was a line to it that was added after it was submitted to them. Again, that is from my negotiation

notebook and it has the marks on there that would have been made by me during negotiations or in revising it to a later proposal.

Q I show you what has been marked as Union Exhibit No. 7 and ask you to identify that.

[11] A Yes. This is the language which was drafted following the passage of Assembly Bill 198 so that our proposal conformed to the Statute. It was then given to the Board of Education Negotiation Team on that date, November 17, 1971.

* * *

(Documents previously marked for identification as Union Exhibit No. 6 and Union Exhibit No. 7, were received in evidence.)

* * *

Q Is it part of your duties, or do you in the performance of your duties, Mr. Matthews, attend School Board meetings when there are matters which would be relevant to Association business?

A Yes, I do.

Q Did you attend a full Board meeting on December 6, 1971?

A Yes, I did.

Q Was there a matter of Association business that was going to be discussed at that meeting?

A Our President was going to make a statement at that meeting and we had several teachers attending that meeting also — part of some extracurricular activities.

Q Were any other matters that you were aware of that might, or that you had been informed might come up at that meeting?

A No.

Q There were no other matters that were going to come up at that meeting that you were aware of prior to the meeting?

A I was aware that Mr. Holmquist had contacted some teachers requesting their signatures on a document and that he was to present that document to the Board that night.

Q How did that information come to your attention?

A From some of our faculty representatives in various buildings.

Q Prior to the School Board meeting, did you discuss the matter of the petition with any members of the Administration?

A I had discussed it at some time previous to that date with Dr. McGrew and Dr. Sapone.

Q The petition itself?

A No. I discussed the activity. The petition was a document, [12] I believe, which began on or about December 6th.

Q When you say "discussed the activity" what do you mean, sir? What activities?

A The opposition that these gentlemen had to our proposal on the fair share.

* * *

WITNESS MATTHEWS: I discovered their disagreement with our proposal with members of the Administration.

* * *

Q When did you first learn that Mr. Holmquist would address the Board on December 6th?

A On December 6th.

Q Was that prior to the meeting?

A Yes, it was.

Q What time of the day did that come to your attention?

A I believe it was mid-afternoon.

Q And how did that come to your attention?

A Judy Cameron, the Faculty Representative of Gompers School called and later came into the office with one of the petitions that had been sent to her school asking for teacher signatures in that building. And later, Rich Kloiber, who is a Faculty Representative at Sandburg School called to state the same thing. We received several similar calls. Mr. Kloiber stated that it was requested that teachers in his building give their permission for the document to be signed in their name.

Q Did you, at the learning of this event, did you discuss it with any members of the Board of Education?

A I discussed it with Mr. Yelinek.

Q When did you discuss it with Mr. Yelinek?

A I discussed it with him in the parking lot of the Board of Education building as he was going into the building.

Q Who was present at the time of that discussion?

A Joe Mason, a teacher at LaFollette High School, and myself and Mr. Yelinek.

Q And Mr. Yelinek is a member of the Board of Education? Is [13] that correct?

A That's correct.

Q What was the nature of that discussion?

A I had the decision of the W.E.R.C. and the Circuit Court in my hand —

* * *

Q Would you relate what you said or what Mr. Mason said or what Mr. Yelinek may have said during that conversation?

A I had those two decisions that I mentioned.

Q Which decisions are these?

A The W.E.R.C. decision and Judge Maloney's decision from the Circuit Court regarding the Milwaukee School Board — School Director's decision concerning the AFT, speaking in Milwaukee on negotiable items.

Q Go ahead.

A And I had the pertinent sections underlined as I saw them as they related to the proposed appearance by Mr. Holmquist and I asked that Mr. Yelinek read them and he did and I told him what my conern was, that there were individuals other than the agents of the Madison Teachers who were intending to speak that evening on negotiable items and after he read that we discussed them very briefly. I asked him if he could bring this to the attention of the Board or if he thought that I should go in and address the Board myself and he indicated that he would take care of it.

Q Is that it?

A That was it and he went on into the meeting.

Q Did you discuss it with anyone else prior to the meeting?

A I discussed it with Mr. Reed and Mr. Holmquist.

Q And where did that conversation take place?

A It took place initially as I went in to reserve some chairs for our officers and myself in the front of the auditorium because of the number of people who were attending that [14] particular meeting and Mr. Holmquist and Mr. Reed were in the auditorium at that time. I discussed it very briefly with them at that time and they went somewhere — left the auditorium —

Q (Interrupting) Well, let's take that conversation. What did Mr. Reed and Mr. Holmquist say and what did you say at that time?

A Well, I asked them, in particular, what their objections to our fair share proposal were and why they were pursuing it in the manner in which they were and I explained that we had presented the item in negotiations the previous year and had received no objections from anyone. We had the matter that went all the way through into our fact finding at that time and our fact finder stated that the law wasn't permissible at that time. I guess that was about the basis of that particular conversation.

Q And then there was later conversation?

A Yes.

Q And where did that occur?

A This occurred after I went out and got Mr. Mason, as we went back into the building, stopping to talk to Mr. Yelinek and went down to where Mr. Holmquist and Mr. Reed were meeting.

Q Where were Mr. Holmquist and Mr. Reed meeting?

A They were meeting in Dr. Sapone's office.

Q Where is Dr. Sapone's office?

A It's in the Administration Building. He's Director of Curriculum. They were using his quarters for their meeting.

Q Did you, then, go into that office?

A I rapped on the door several times and the door wasn't answered and we later gained access by someone opening the door for us.

Q The door to what, sir?

A To the Curriculum Department.

Q What occurred then?

A Then Joe, primarily, discussed the issue with them then.

* * *

WITNESS MATTHEWS: Joe Mason. Excuse me. He talked to them for quite a while, as did I, and asked them what their intentions were and why they were using this particular [15] forum and I either talked to them at that time, or previous to that time, about the process that we go through in submitting and gaining our proposals from the members and then going back to the membership with written documents to our council and, finally, holding open hearings and we had no objections all through that particular process until the movement was begun by these two gentlemen.

* * *

Q Is that the sum of it?

A Yes.

Q What was the response of Mr. Holmquist and Mr. Reed, if any?

A I know that Mr. Reed stated that they didn't really disagree with the philosophy. They were questioning what a fair share was and the conversation that pursued was if they had that disagreement, why didn't they bring it to the Association rather than using the School Board meeting.

CHAIRMAN SLAVNEY: Were either Mr. Reed or Mr. Holmquist, at the time of this activity, members of MTI?

WITNESS MATTHEWS: Not to my knowledge. I've never checked on their membership. Mr. Kops stated in his document that they were not.

* * *

Q Following that conference, was there a meeting of the School Board?

A Yes, there was.

Q Where was that meeting held?

A In their auditorium at 545 West Dayton.

Q And other than the School Board, were there other members present?

A Three or four hundred teachers present, and press.

CHAIRMAN SLAVNEY: No citizens?

WITNESS MATTHEWS: Yes. There were some other citizens present because some of them made a statement during the open part of the Board meeting under Public Appearances. A clear majority of them were teachers at that time.

[16] COMMISSIONER RICE: They, also, are citizens.

WITNESS MATTHEWS: Yes.

* * *

Q I understand from your answer that there is a portion of the School Board meeting or agenda called Public Appearances. Is that correct, sir?

A That's correct.

Q That evening, did members of the public or did persons make public appearances before the School Board meeting on various issues?

A Yes.

Q Did anyone representing the MTI appear before the School Board there that evening?

A Yes, Mr. du Vair did, the MTI President.

Q Who is Mr. du Vair?

A President of MTI.

Q He made an appearance before the School Board?

A Yes.

Q And it was during the Public Appearances portion?

A That's correct.

Q What was the matter that Mr. du Vair discussed with the School Board?

A Mr. du Vair expressed the desire of MTI to resume negotiations and reach an agreement as soon as possible, stressing that we should do so before the Christmas vacation began and he then presented some documents to Mrs. Doyle.

Q What documents did he present to Mrs. Doyle?

A The petition that was circulated to our membership signed by, I guess, thirteen or fourteen hundred of them.

Q And this was presented by Mr. du Vair as President of MTI?

A That's right.

* * *

CHAIRMAN SLAVNEY: What type of petition?

WITNESS MATTHEWS: The document stated quite simply that "We, the undersigned wish the parties to resume negotiations and reach agreement as quickly as possible."

* * *

[17] CHAIRMAN SLAVNEY: Okay. Has it been established that Mrs. Doyle is President of the School Board? Is that admitted?

MR. KELLY: Yes, yes, sir.

DIRECT EXAMINATION
OF MR. MATTHEWS CONTINUED:

Q Did any other teacher address the Board that evening?

* * *

A No one representing MTI.

Q No. Regardless of who they were representing, did any other teacher speak to the Board that evening?

A Mr. Holmquist did and identified himself as a teacher at Crestwood School.

Q Did Mr. Holmquist speak before or after Mr. du Vair, if you remember?

A He spoke after Mr. du Vair.

Q And what did Mr. Holmquist speak to the Board about? What was his subject?

A Agency Shop.

Q And what remarks did he make? What did Mr. Holmquist say?

* * *

A (By Witness Matthews continuing) Mr. Holmquist stated he was a teacher at Crestwood School and was representing seventy-two teachers in forty-nine schools and that he had a petition of teachers who were concerned. He read through the petition and, basically, that was his statement, that they wanted a year's delay in negotiations on the matter and they wanted the teachers to be polled and a neutral third party — I'm paraphrasing his words now — to conduct the opinionnaire and release the results.

Q Did the Board respond at all to Mr. Holmquist?

A Mrs. Doyle stated that she would receive his petitions, which [18] he did not have at this time, or he didn't have all of them. He didn't have some of them. He wanted time to turn the balance of them in.

Q (By Mr. Kelly) Did any other Board member speak to Mr. Holmquist?

A I don't believe they did.

Q Was that the sum of Mr. Holmquist's statement to the Board?

A Yes, I believe it was.

Q How long would you say his remarks took?

A About five minutes.

Q On the following day did you have occasion to meet the Superintendent of Schools — Superintendent Ritchie?

A Yes, I did.

Q And what was the nature of that meeting?

A It was a bargaining session that, actually, was being conducted not by the regular full teams from each side but by Dr. McGrew and myself and our President and Dr. Ritchie.

Q Did Dr. Ritchie, during that meeting, discuss the School Board meeting the night before?

A Yes, he did.

Q Who was present at the meeting?

A Mr. du Vair, President of Madison Teachers; Dr. McGrew, Superintendent Ritchie and myself.

Q And what did Dr. Ritchie tell you of the activities of the School Board at its meeting the night before?

A He gave us a copy of the motion that was passed by the Board in their Executive Session.

* * *

DIRECT EXAMINATION OF MR. MATTHEWS CONTINUED:

Q Mr. Matthews, I show you what has been marked as Union Exhibit No. 8 and ask you if you can identify that document.

A This is the copy that Dr. Ritchie gave us.

Q And this was given to you at negotiations that particular day?

A Yes. Mr. du Vair and I had met with the other two individuals mentioned, I believe, on three previous occasions and this meeting had been planned — it would

be after the [19] School Board meeting on Monday night, and this was his opening to that meeting and he was saying that this is the deal.

Q This is a short paragraph. Let me read it and see if I read it to you correctly: "It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and *not* including agency shop; if the MTI does not accept this as a total package, the offer of arbitration is withdrawn." Did I read that correctly?

A That is exactly correct. The "not" was underlined when he gave it to us. This is the document itself that was given to us.

* * *

(Document previously marked for identification as Union Exhibit No. 8 was received in evidence.)

* * *

[20] * * *

Q Mr. Matthews, did fair share continue to be, after December 6th, continue to be a matter that was discussed at the collective bargaining table?

A On December 6th it was discussed and it was discussed on December 7th.

Q Did it continue to be discussed after December 7th?

A I believe we reached agreement on December 7th. On December 6th and the afternoon of December 7th it was discussed quite frequently and the fact that the Administration wanted to revise some of the dismissal and non-renewal procedures and I offered to make that exchange for the fair share.

Q Let me ask this, sir. Did you come to an agreement for the school year, 1972?

A Yes, we did.

Q Was fair share a part of that agreement?

A No.

* * *

Q (By Mr. Kelly) Did you withdraw fair share from the [21] negotiations?

A No, we did not.

* * *

WITNESS MATTHEWS: It wasn't withdrawn in the bargaining. It was withdrawn inasmuch as we reached agreement.

MR. KOPS: Oh, you gave up on it.

WITNESS MATTHEWS: We gave up.

MR. KOPS: Oh, you didn't withdraw it then?

WITNESS MATTHEWS: That's correct.

MR. KELLY: I have no further questions.

CROSS-EXAMINATION OF MR. JOHN A. MATTHEWS BY MR. KOPS:

Q Mr. Matthews, you indicated that fair share was first proposed in January of 1971. Is that correct?

A It was actually proposed in January of 1970 but for the bargaining of 1971 it was proposed in 1971.

Q So, for the bargaining for the '72 agreement, the first time that fair share was presented was January of '71. Is that correct?

A That's correct.

* * *

[22] Q And this matter was discussed in January, then, I imagine, after the proposal was made. Is that correct?

A That's correct.

Q It wasn't agreed upon, was it?

A No.

Q Then, in October it was still on the table and some revisions took place in your proposal. Is that correct?

A That's correct.

Q And did the negotiating team of the Board of Education ever indicate that it agreed to the proposal that was submitted in October?

A No.

Q Now, in November, after the law, negotiations were still continuing on this matter, was it not?

A That's correct.

Q And you said — you placed another proposal on the table, supposedly in conformity with the recent law passed amending 111.70. Is that right?

A That's correct.

Q And this proposal — did the Board indicate, or did the negotiating team indicate that it would or could accept that proposal at that time?

* * *

A (By Witness Matthews) The objection prior to that time [23] had been that the law didn't permit it and this is what the Fact Finder had said the previous year and basing teachers' activity behind 198A, we went ahead and put it in our proposal for the 1971 negotiations toward the 1972 agreement. So, in October I drafted the language that when the law became effective that it would then become effective and Mr. Olson then objected — he was their chief negotiator at that time. Mr. Olson then objected that he wouldn't enter into any permissive agreements. That brings us up to the point.

Q (By Mr. Kops) That's November?

A That was in the middle of October.

Q So the Board, through its chief negotiator, refused to accept the October proposal. Is that correct?

A That's correct.

Q Then the law was passed and you drafted another proposal, supposedly this time in conformity with 111.70. Is that right?

A That's correct.

Q And it was placed on the table in November. Is that right?

A Mid-November.

Q Did you have any meetings or discussions concerning that proposal?

A It was submitted by — I don't believe there were any discussions. There was a flat denial of it.

Q When was the denial?

* * *

CHAIRMAN SLAVNEY: Was it before the December 6th meeting?

WITNESS MATTHEWS: Yes.

Q (By Mr. Kops) So, as of the December 6th meeting the Board of Education did not, at any time, espouse acceptance of the Fair Share proposal. Is that right?

A They had never discussed it in view of accepting it for the 1972 bargaining contract.

Q Would you answer my question.

A Could I have it read back?

CHAIRMAN SLAVNEY: Well, the question was whether or not the School Board ever espoused the acceptance of [24] the Fair Share agreement?

MR. KELLY: To you, did anyone representing this Board ever indicate to you that they accepted it?

WITNESS MATTHEWS: No acceptance for the 1972 contract. They had, several times, said bring it in next year.

Q (By Mr. Kops) And you took that as being a denial of acceptance for the coming year. Is that it?

A (By Witness Matthews) That's correct.

Q And you said they had said this on a number of occasions. Is that right?

A That's correct, following, say, November and December.

Q Did their position — so, their position didn't change after the December 6th meeting, did it?

A It was a flat no at that time.

Q It was a flat no before, too, wasn't it?

A Well, previous to that time, as I said, Mr. Olson said it wasn't permissible by Statute and then we defined the language where it would become effective when the Statute was passed and he wouldn't accept the permissible language so I suppose it was open.

Q Could I have the answer to my question? Just their position — the Board's position after December 6th, was no different than it was prior to December 6th.

[24] * * *

CHAIRMAN SLAVNEY: The position was no different, but the reason for the position was different. Is that right?

WITNESS MATTHEWS: Yes.

CHAIRMAN SLAVNEY: All right.

Q (By Mr. Kops) What were the reasons that the position was different after December 6th, if you know?

A I don't know. They had no reasons other than the motion that was given us.

Q So you don't know if the reasons were different, do you?

A Previous, they were stated that the law did not permit it. Then, after we drafted the language, there was never any discussion by the complete bargaining teams. There was discussion between Mr. du Vair, myself, Dr. McGrew and [25] Dr. Ritchie concerning that but there were no reasons given.

Q So, you don't know if the reasons were any different after December 6th? All I want to do is get an answer to my question in this matter as opposed to before December 6th.

A If I made a statement it would be beyond my — it would be my assumption so I don't know.

Q All right. Now, you say the original fair share proposal was put in in January. When did you first notify your membership that this was the proposal that was being put on the negotiating table?

A Approximately October of 1971.

Q So it wasn't until October of '71 that you gave anybody from your collective bargaining unit an opportunity to express their opinion concerning this matter as an item for negotiations. Isn't that right?

A No. Actually, we had submitted the proposal in our original document which was submitted in January of 1970. That particular year we went through Fact Finding so it had been discussed and had been sent to the membership in 1970. Throughout the year it had been discussed in our Counsel. Previous to that we had taken positions of the Association supporting Assembly Bill 259 which contained a similar provision. We then submitted it

— in September or October we requested items for negotiations from our membership. From that we gathered them in rough form and sent them to all the membership for their review and objection, statements, revisions and so forth and then refined, from what comes back and then it goes back to each member and an open hearing is held at which time we can again revise, remove and so forth.

Q When was that open hearing held for the 1971 negotiations concerning this agreement?

A For the negotiations that took place during 1971?

Q Yes.

A Those hearings are held in November of the year before.

Q So from November until the following October there was no opportunity given to your members to, at least by way of a public hearing, for your collective bargaining members to discuss the fair share agreement or lodge objections. Is that right?

[26] A No, that's not right.

Q When, during 1971, was your membership given an opportunity, as you suggested they were, I think, to express their feelings concerning the fair share proposal that you had in your initial proposal in January?

A Three times a month.

Q All right. You suggested that the membership was not informed until October of 1971 that the fair share agreement was being proposed for the '72 contract. Is that correct?

A I believe that's correct.

Q Now, after October of 1971, was an opportunity given via public hearing?

A No. That wouldn't be correct. You're in 1971. The proposal for that year would have been developed in October of the previous year.

Q So, you're indicating that in October of 1970 your membership was given an opportunity to express their views concerning the proposed package. Is that right?

A That's correct.

Q So, in October of 1970, that was the first time that your membership was aware of the fact that you were going to propose the fair share during the '71 negotiations. Is that right?

A That's correct.

Q Okay, now from October of '70 until October of '71, was there any opportunity given to your membership to — well, did you ever, during this time, present any information to your membership concerning the fair share?

A Yes.

Q When was the first time?

A It would have been in October when we submitted the rought draft of our proposal of the items that came in from the membership, the items that were added by the Council, the Board of Directors and myself.

Q Are we talking about October of 1971?

A Of 1970.

Q I'm talking about from the period of October, 1970 to October of 1971. From that time on, did any communication take part from MTI to the members, giving them information concerning fair share?

[27] A. Yes, I'd have to say so many times it would be ridiculous. Fifty to a hundred times.

Q And these were communications indicating that this was an item that you were proposing for bargaining?

A Yes, through our intended proposal the revisions did not go to every teacher. After it's approved by the Council, it goes to every teacher. When we submit the

proposal to the Board of Education, a copy is duplicated and sent to every teacher, through out support of Assembly Bill 198, through our publication, goes out every two weeks, approximately. That bill was pushed over and over and over and requests made to write to their Assemblymen and Senators with that language in it explaining why we needed that legislation adopted.

Q You are suggesting that these proposals that you submitted in evidence and the updated drafts were sent to all teachers. Is that right?

A That's correct.

Q In other words, every teacher in the system gets a copy of the initial proposals and the updated proposals concerning fair share?

A Everybody in the bargaining unit.

CHAIRMAN SLAVNEY: Even though they're not members?

WITNESS MATTHEWS: That's correct.

Q (By Mr. Kops) Even though they are non-members, they are notified and allowed an opportunity to express their opinions concerning this?

A Yes. When I made the comment, "about three times per month," our Board of Directors meets twice monthly and our Faculty Representative Council, representatives of each building meet monthly with the exception of the summer. Our Board of Directors does meet during the summer. But, anyone in the bargaining unit can speak with the permission of the Council, whether they're a member of the Council or not. No one has ever been denied that privilege.

Q Nobody has ever been denied the privilege to speak — Union or non-Union member?

A That's correct.

Q You send out notices of these meetings to all members of the bargaining unit?

[28] A Yes, we do.

Q These are sent out three times a month?

A We print three thousand of them so that every Administrator, Teacher, Custodian and Cook has one.

Q And you are indicating that nobody, between the entire period of 1971, ever expressed any opposition to inclusion of fair share in the proposed agreement. Is that right?

A That is correct.

Q Not even John Waldman?

A Not as far as it being a negotiable item

Q I'm talking about inclusion of it in the proposal. I'm talking about it from the standpoint of a negotiable item. Did any member of the Board object to the inclusion of this?

* * *

A (By Witness Matthews) He might have made a statement. I'd have to let him attest to that or else review the minutes of the meeting, but there was never any action taken that I can recall.

Q (By Mr. Kops) So, there were people that expressed an objection to the inclusion of the fair share in the proposal to be given to the Board of Education. Is that right?

A No, not to my recollection.

Q No arguments were presented against that inclusion before the Board of Directors?

A I haven't reviewed the minutes but I don't recall any motions taking place.

Q Did anybody appear on behalf of the teachers and argue against the inclusion of this proposal in the negotiating package?

A No, and I can say that because the guests who appear are very few and I don't ever recall anyone else ever speaking.

Q So then it's a fair assumption to make that the Board of Directors and the Council was unanimous in its support of the fair share for the bargaining package for the 1971 agreement?

* * *

[29] WITNESS MATTHEWS: There were no objections that I know of and I don't believe that anyone asked that their vote be recorded as abstaining or voting no.

Q (By Mr. Kops) Now, you met with Mr. Yelinek in the parking lot on December 6th, didn't you?

A That's correct.

Q And you brought the matter of the appearance of Mr. Holmquist or proposed appearance of Mr. Holmquist to his attention. Is that right?

A That's right. That's correct.

Q He didn't know a thing about it, did he, at that time?

A No, he didn't.

Q In fact, he didn't have any knowledge with regard to the petitions, did he?

A He didn't discuss any petitions. He didn't State anything. I can't really say what he knew.

Q He indicated to you during that conversation that he had never met or discussed this matter with Mr. Holmquist?

A No, sir.

Q On the night of December 6th, you communicated that there were about three hundred or four hundred people present in the audience. Is that right?

A Yes.

Q Prior to that meeting, MTI had published a full-page ad in the newspapers, had it not?

A That's correct.

Q And also, prior to that meeting, there was picketing taking place at all the entrances to the Board of Education. Is that correct?

A That's correct. Not all the entrances, no. Not the back parking lot entrance — just on the sidewalk portion.

Q On the sidewalk portion blocking entrance to the parking lot. Is that right?

A No, we didnt' block the entrance to the parking lot. We didn't go across the driveway.

Q Okay. And what time did you arrive at the meeting on December 6th?

A We arrived there, I believe, at 6:00 o'clock.

[30] Q And who did you arrive with?

A I believe I went down by myself. No, I did not. It was with Mr. Schaefer and Mr. du Vair, and I guess that was all.

Q When did you first hear that there was any kind of activity concerning objections to the fair share proposal?

A Primarily on December 6th when the matter of the petition came up.

Q When did you first hear any objections or know that anything was taking place concerning objections to the fair share proposal?

A May I research my file?

* * *

A (By Witness Matthews) We got a letter which was sent to a number of teachers and the postmark is November 14th. This was sent by Mr. Reed and Mr. Holmquist and shortly after that it came to our attention.

Q (By Mr. Kops) All right. It was by letter of November 14th and after that what action did you take?

A We took none.

Q Well, did you seek out Mr. Holmquist and Mr. Reed to see what their objections were to the proposal?

A No. The matter was discussed at our Council meeting which was held later in the month of November.

Q Okay, after you received this letter you took no action as far as contacting them. Did you take any action concerning contacting other teachers in the school?

A What school?

Q Any of the schools concerning this?

A We discussed the matter at our Council meeting in which we have representation from all schools.

Q And what was the nature of those discussions?

A Well, the teachers were pretty hot under the collar and it took some movement to restrain them from interfering in the bargaining process. The people were pretty up-tight. They directed me to see what I could find out as to who was behind this particular letter. It went to a fellow Madisonian educator under the auspices of ecology.

Q Did you, at any time, other than trying to calm the members, seek out these members to see what their objections to the [31] fair share were and bring those to the attention of your Council?

A When you talk about "members," who are you talking about?

Q Well, as I recall you indicated that these Board sessions or Council meetings were really forums for all

teachers and I'm wondering whether or not you invited Mr. Reed or Mr. Holmquist to discuss their objections to the fair share?

* * *

WITNESS MATTHEWS: No, sir.

Q (By Mr. Kops) Would it be fair to assume that you considered this letter an interference with the bargaining process?

A (By Witness Matthews) I believe what we did was to respond to it in a publication. I believe we put out a publication during — the trouble we were having in bargaining in late November or early December — a publication called *Crisis* or *At Issue* and in that we explained the MTI position in this regard.

* * *

Q (By Mr. Kops) Then, after November 17th, when was the next time that you had opportunity to come in contact with the dissenting position concerning fair share?

A December 6th, I believe.

Q So, from November 17th to December 6th nothing occurred on this issue between you and Mr. Reed and Mr. Holmquist. Is [32] that it?

A I never talked with them, no.

Q You never made — between that period of time, did you ever attempt to contact them?

A No, sir.

Q Now, between November 17th and December 6th, did you contact any — well, November 14th, the first time you became aware of this, and December 6, 1971, did you talk with any member of the Administration concerning this?

A Yes, I did.

Q Who did you talk with?

A I talked with Dr. McGrew.

Q When did you talk to him?

A I don't know what the date was.

Q Well, was it after November 17th?

A Yes, it was. The date was on the day a given gentleman had been invited to Madison from Illinois, I believe, to discuss differentiated staffing.

Q That's how you place the time. Is that it?

A Yes. Following that meeting — I had been meeting with the Superintendent and Mr. du Vair was attending the meeting for Madison Teachers and Mr. Holmquist was in this same meeting and I questioned how Mr. Holmquist should be there when they invited members from MIT.

Q All right. You discussed this matter with Dr. McGrew and we don't know the date but it was sometime between November 17th and December 6th. Is that it?

A That's correct.

Q Who else was present during that conversation?

A Mr. du Vair and shortly thereafter, Dr. Sapone.

Q And what was the nature of that conversation?

A I questioned the connection between Mr. McGrew calling me and asking me to have three teachers to represent MTI at this presentation on differentiated staffing and another teacher being there.

Q Well, I'm specifically talking about conversation you would have had concerning this fair share activity — this dissenting activity that was taking place in the schools. Did you talk to Mr. McGrew about that issue at all?

A I questioned the connection between Mr. Holmquist being at [33] that meeting and, in my mind, supporting the Board of Education in their denial of our fair share proposal.

Q And what reply did you receive?

A I received the reply that Mr. Holmquist had contacted them.

Q Contacted them concerning what?

A Wanting a list of the members of MTI — people, apparently, who were on payroll deduction of dues.

Q And what else did you find out?

A Mr. McGrew told me that he didn't give him that data.

Q What else did you talk about?

A We discussed — relative to this I said "How did Mr. Holmquist get to the meeting and why was he released from school" when we were requested to provide the teacher representation and Dr. McGrew answered that he didn't know, whereupon he called Dr. Sapone who was walking down the hall and he responded that he had invited Mr. Holmquist.

Q This was on some other issue other than negotiations? Is that it?

A He had invited Mr. Holmquist to come to that meeting on differentiated staffing.

Q And that was not a negotiation session, was it?

A No, they were discussing a philosophy.

Q Now, was this the only matter that you discussed with Dr. McGrew at that time, simply about the list of members and that was refused by the Administration?

A We battered it back and forth a little bit but what was said was said not seriously and I certainly wouldn't hold him to what was said.

Q All right. Now, after this conference with Dr. McGrew— well, at the conference with Dr. McGrew, since this matter had come to your attention, did you initiate any conversation concerning Mr. Holmquist's position on fair share?

A Not with Dr. McGrew, I don't believe.

Q While you were at the meeting — you were at the meeting with Mr. Holmquist, were you not?

A I wasn't with Mr. Holmquist. Mr. Holmquist returned to his school after that meeting.

Q All right. You were in a meeting. Is that it?

A No, I was not. Mr. Du Vair was.

Q Are you talking about the meeting of December 6th?

[34] A No, I'm talking about the meeting on differentiated staffing.

Q Were you at that meeting?

A No, I wasn't. I had been in a meeting next door with the Superintendent and I went into that meeting following. The meeting was just breaking up.

Q Mr. du Vair was at that meeting?

A That is correct.

Q Mr. du Vair was aware of Mr. Holmquist's position on fair share, wasn't he?

A I'm sure he was.

Q Do you know if he initiated any inquiry of Mr. Holmquist after that meeting concerning Mr. Holmquist's position?

A Not to my knowledge.

Q Okay, now after this meeting was there any other meeting with the Administration concerning the activity by Mr. Holmquist and Mr. Reed with the Administration?

A The topic may have been mentioned in succeeding meetings when we were meeting on other topics but there was no specific meeting to discuss this.

Q So then there was no contact with the Administration or Mr. Reed or Mr. Holmquist until December 6th of 1971. Is that it?

A That's correct, with regard to myself.

Q And on December 6th you arrived at the meeting at about 6:00 o'clock in the evening. Is that it?

A That's correct.

Q What was the first thing you did when you arrived at the school that evening?

A Take the picket signs out of my car and stand them next to the fence.

Q When was the first time that you had occasion, during that evening, to meet with Mr. Holmquist and Mr. Reed?

A After we got our people organized, I went in to place some books and so forth on some chairs so that we would have a position in front of the auditorium.

Q And was it at that time that you came in contact with somebody?

A That's correct. They were in the building at that time — Mr. Reed and Mr. Holmquist.

Q And did you speak with them at that time?

[35] A Yes.

Q In the auditorium?

A That's correct.

Q And what did you say to them at that time?

A I've known Mr. Holmquist since he came to Madison and I exchanged a few hello's and so forth and then —

* * *

A I wouldn't swear to Mr. Reed being there. I belive that he was there. Either that or he came in shortly after that. The two of them were together as they went down the hall and went into the Curriculum Department office. Yes, I believe he did come into the auditorium but they weren't in there at the same time when I arrived.

Q All right. Now, I'm talking about the first conversation you had during that evening and I believe you said it was with Mr. Holmquist and I want to know who was present at that time. Who was present?

A I believe Mr. Holmquist and I were talking and Mr. Reed came in from the back of the auditorium and came down to where we were.

Q And I want to know what you said during that conference concerning this issue.

A I was talking with them concerning their position and asked them what their opposition was and I believe —

* * *

Q And you asked him what the nature of his opposition was? Is that it?

A That's correct.

Q And that was the first time since November 14th that you ever asked him that question?

A That's correct, as far as I can recall.

Q And what was his response?

A His response, I believe, was that they wanted the people — the teachers to have the choice and I went through our process in which we gather items for negotiations and so forth, as [36] I've already explained here and as we went on through it he mentioned something to the effect that he just wanted the people to have a choice.

Q All right. Now, at that time did he indicate to you or talk to you concerning speaking to the Board of Education or attempting to that evening?

A I brought that up.

Q Did he also indicate to you any matters concerning the petition that was being circulated?

A We discussed it, yes.

Q Did he, at that time, give you or tell you what the petition was?

A I had a copy of it. I don't know that he gave me one.

Q Now, that petition was headlined "To: Madison Board of Education and Madison Teachers, Incorporated," wasn't it?

A I don't recall. I could look. I believe I have one.

Q Why don't you look at it?

A Yes, it is.

Q All right. It's directed to the Madison Board of Education and the Madison Teachers, Incorporated, is it not?

A That's correct.

Q Did he ever indicate to you at that time or at that first meeting that he intended to present to you the results of the petition which he was presently circulating?

A Not to my knowledge.

Q You don't recall him making that statement during your first conversation on December 6th?

A No.

Q Okay, and at that time do you recall mentioning to Mr. Holmquist these decisions which you had by Circuit Judge Maloney and the W.E.R.C., I think it was W.E.R.B. at that time, concerning appearances at public meetings?

A Yes, I did.

Q What did you say to them about that?

A I told them that it didn't appear to us that they had the right to appear in that type of forum and I went through the same, underlining the portions of those two decisions that I went through with Mr. Yelinek.

Q Okay, now you did this with both Mr. Reed and Mr. Holmquist at that conference. Is that it, on December 6th?

[37] A I believe, yes, Mr. Reed was there by the time I went through that.

Q All right. You don't happen to know about what time that was, do you?

A A quarter to seven, maybe — seven o'clock.

Q All right. Now, what happened after that first meeting? What did you do after that meeting with Mr. Holmquist?

A I went outside. The first thing I did was watch to see where they went.

Q What did you see?

A I saw them walk down the hall and go into the Curriculum Department.

Q Now, when you saw them go into the Curriculum Department, did they have a key?

A I don't know.

Q Did you see them just open the door and walk in?

A Yes. I don't know if they opened the door. I saw them walk in. The door may have been propped open.

Q Do you know if the door was open or not?

A I have no idea.

Q And when you saw them enter a room in the school, what did you do then?

A I went out and talked to Mr. du Vair and I said I think we need a Witness to the effect that these gentlemen were using the School Board facilities.

Q Have you ever used a phone around the School Board before having permission?

A Have I ever used the phone without permission?

Q Yes.

A I don't believe I have, without asking someone.

Q Do you know if Mr. Holmquist and Mr. Reed had permission to use that room?

A I had know idea.

Q But instead of going to get a Custodian, you went out to talk to Mr. du Vair? Is that correct?

A That's correct.

Q All right. Then after you talked to Mr. du Vair, what did you do?

A I returned to the building with Mr. Mason.

Q So then the three of you came back to the Board building, [38] Mr. Mason, Mr. du Vair and yourself? Is that it?

A No, Mr. du Vair stayed out with the troops.

Q So it was just Mr. Mason and yourself?

A That's correct.

Q And as you returned to the building, is that when you came into contact with Mr. Yelinek?

A That's correct.

Q So it was before you entered the building that you talked with him. Is that it?

A That's correct.

Q I think we've already established that Mr. Yelinek, at least as far as you were concerned, had no idea about this, did he?

A That was my understanding or the impression that I got.

Q And what time was that?

A Shortly after 7:00 — maybe 7:15 or 7:20 or something like that. I had been outside maybe five or ten minutes and went back in.

Q Did you contact any other members of the Board of Education that evening, prior to the meeting of December 6th?

A No, I did not.

Q Between November 14th and December 6th, when you first had any notice of this activity on the part of Mr. Holmquist and Mr. Reed, did you contact any member of the Board of Education?

A I don't believe so.

Q Did you contact any member of the negotiating committee other than Dr. McGrew at that one meeting between November 14th and December 6, 1971?

A I had frequent conversations with Mr. Olson.

Q And those conversations between November 14th and December 6th concerned the activities of Mr. Holmquist and Mr. Reed?

A No.

Q So then this item was not a topic or a discussion between you and the Administration or between you and the Board of Education or between you and Mr. Holmquist and Mr. Reed during the period of November 14th to December 6th?

A I had talked to Mr. McGrew about it.

Q Other than Dr. McGrew?

A No, I don't think I talked to anyone else about it.

[39] Q All right. Then after you had your confrontation with — I don't want to use that word. After you discussed this matter with Mr. Yelinek, what did you next do?

A I entered the building with Mr. Mason.

* * *

[40] Q Now, just a minute. Had you informed your teachers what you thought a fair share was?

A Yes, we had.

Q And that fair share was all of the dues — local, national and statewide. Is that it?

A That was the impression that we had operated under. Some of [41] our Council members questioned that later but that was the official position of the organization.

Q So, proportionate fair share was really the entire dues for unified membership in these three organizations, the MTI, the WEA and the NEA?

A That was the position as we went through it. When the legislation was changed in the legislative process, there was some concern about the wording. As you may recall, it was to be mandatory under the proposed Statute but that was taken out in the Senate.

Q Okay. So that was Mr. Reed's response. What did you respond to that?

A My response was, as I just mentioned, that his issue then should be with the Legislature and not with the organization, Madison Teachers.

Q After that, did you talk at all with Mr. Holmquist?

A I may have, briefly. I don't recall that I did. It was pretty much a four-party conversation. However, at this point Mr. Mason and Mr. Reed were the dominant parties in this conversation.

Q Now, at that time did they indicate to you what their purpose was in the room?

A Yes. They said they wanted a year's delay.

Q No, what their purpose was in the Curriculum room?

A No, they did not.

Q And they indicated to you at that time that they wanted a year's delay or that's why they were present at the meeting that evening?

A That they were going to present this petition of their concern to the Board.

Q Now, at that time they indicated, also, that they were going to present a petition to you. Is that right?

A I don't know that they did. I don't recall them saying that. They wanted a third party to conduct a survey and make the findings public. So, that things addressed to Madison Teachers, I don't ever remember it being pointed out to us that they were going to deliver anything to us.

Q Did you offer them anything, that they would not appear at the Board meeting that evening? Did you offer them — did you make any offers if they would not appear at the Board that [42] evening at the conference?

A We expressed some of our ideas that were, until that point, confidential to the bargaining team and that we needed this as a bargaining tool. The Board of Education had built this as a number one priority and attempted to make the teachers come to the point that there was only one item holding us apart and that was fair share.

Q Now, you're saying the Board of Education, and this is prior to December 6th, had made that —

A (Interrupting) I should retract my statement. Instead of Board of Education, to state Administration.

Q Prior to December 6th the Administration had made this a prime item. Is that it?

A Yes, when this became an issue after we had gone to impasse, the Administration attempted to show that this was an item that was holding us apart. This was the only item — it was Union security. It meant nothing to the members. And when it appeared that — well, I guess it

really surfaced about the time that we went to impasse and this ecology letter came out.

Q So, at any point, as of December 6th, the Administration's position on this item was firm, in the negative, as far as fair share was concerned. Is that it?

A No. It was firm as far as official bargaining sessions went. There was a time when we were told that there were two members of the Board of Education who would approve fair share if we would not push them in the area of final and binding arbitration for non-renewals.

Q You never heard that from the bargaining committee though.

A We heard this from Mr. Olson who represented them. This was never mentioned at any official bargaining session. It was mentioned in a discussion between Mr. Speerschneider and Mr. Olson. Mr. Speerschneider is our Chief Negotiator and was meeting with Mr. Olson in hopes of working out a compromise.

Q As of December 6th, however, I think if I understand your statement correctly, the Board of Education or at least the Administration was firm concerning not agreeing to the fair share.

A The deal that was being made was, there were two principal issues in negotiations at that particular point — that of arbitration of non-renewals and dismissals and that of fair share. We were told that there were two members of the Board who would grant fair share if we would drop our demand for arbitration. Now, all of a sudden the thing turned around. That they would go ahead with arbitration for teachers beyond the probationary period only but would, in no way, grant fair share.

Q And this was acceptable to you and you withdrew your demand for fair share. Is that it?

A It was not acceptable to us and it's still not acceptable to us. We reached the agreement because we didn't feel that the fairshare was the issue to strike over. We had achieved everything else that we wanted with one minor exception on transfers. The fair share was simply nothing to hit the streets for.

Q Did you, in fact, withdraw your demand for fair share to reach an agreement?

A We reached an agreement. We did not withdraw. We never officially withdrew our demand for fair share. We agreed without it.

Q So, as of December 7th, when you reached agreement, you dropped your demand for fair share in return for arbitration of non-renewal of non-probationary teachers. Is that it?

A That's correct.

Q Okay, let's get back to that meeting again with Mr. Reed and Mr. Holmquist. Did you, at any time, offer them anything if they would not appear or present their petition or attempt to speak at the Board of Education meeting that evening?

A As I mentioned, we talked about it being used as a bargaining tool. We wanted the arbitration procedure more because it was an advantage to the membership and we told them, in essence, not to pursue that or we were going to lose the whole ball game.

Q I don't think you've answered my question and I think it's the third time that I've asked it.

A I didn't offer them any bribe or bargain that I can recall.

Q Now, did you, at that time, ask for the information concerning fair share that they had developed?

[44] A No.

Q Were you concerned with what the information that they were developing was concerning fair share?

A I was concerned that it was eroding our bargaining position and many of the members felt that the petition that went out came from Madison Teachers, Incorporated and had indicated to us that that is why they had signed it.

Q Okay, now did Mr. Holmquist or Reed indicate at that time that they would give you a copy of the results of their survey that evening?

A I don't remember that but I had many other things on my mind that evening.

Q All right. Did that end the meeting with Mr. Holmquist and Mr. Reed?

A I believe I've gone through everything that I can recall of that meeting.

Q Okay. Then after the meeting, what did you do?

A I went back out with the pickets and about 7:30 or a quarter to eight we went back into the auditorium and sat through the Board meeting and through Mr. du Vair's presentation and through Mr. Holmquist's presentation and we left.

Q Let's go back to the beginning of the meeting. When you went back into the auditorium to your seat, did you find anything on your seat?

A My books.

Q Did you find the results of the survey on your seat, Mr. Matthews?

A No.

Q You're positive of that?

A Yes. I don't recall it being there, no.

Q Then you listened to the speeches, you said, of both people?

A That's correct, plus there was a lady, I believe, from the League of Women Voters or some such organization.

Q What happened December 7th, after the meeting? You were given this motion that was passed in executive session? Is that it?

A Correct. Mr. du Vair and I had another bargaining session with the Superintendent and the Assistant Superintendent.

Q And during that bargaining session, you entered an agreement on the contract. Is that correct?

[45] A That's correct.

Q That was December 7th, wasn't it?

A That's correct.

Q And in that agreement, or the tentative agreement, you agreed to drop fair share in return for arbitration of non-renewal of non-probationary teachers. Is that right?

A In essence, that's correct. We never really dropped fair share, other than the fact that it was not included in the agreement. We decided that we would take the non-renewals and that was the best we were going to get in view of the motion that was passed by the Board the night before.

Q So there was a contract as of December 7th. Is that right?

A Unofficially, yes.

Q Was there any other negotiations that took place between yourself and the Administration and Mr. du Vair concerning the working out of the contract language after that particular day?

A Yes, there was.

Q And did any of this discussion center around the fair share agreement or the arbitration of non-renewals?

A I think I threw it out again. Yes, I know I did. Somebody was talking about instituting — maybe it was McGrew's MBO concept or something else and I said you could get it for fair share. It was some comment like that. Both sides, I don't think, were serious. It was thrown out to them.

Q So in other words, final agreement wasn't reached until December 14th and fair share was still under discussion, wasn't it?

A That's correct. We still had not signed the document.

* * *

Q (By Mr. Kops) Now, you said you were on the negotiating team since 1968. Is that right?

A That's correct.

* * *

[46] Q That particular Conference and Negotiation section indicates that negotiations are to be closed to the public unless the parties in this agreement agree to the contrary. Is that correct?

A That's correct.

Q It also indicates that no releases about negotiations are to be made concerning negotiations without the consent of both parties. Is that right?

A Reports can be made to the members.

Q Were any releases made to the news media without the consent of the public schools?

A Not before impasse was reached.

Q So, in fact, information was released to the news media without the consent of the Administration?

A Well, I believe that if you go on you'll see that after impasse it's a different situation.

* * *

REDIRECT EXAMINATION OF MR. MATTHEWS BY MR. KELLY:

Q Mr. Matthews, does MTI have an office?

A Yes, sir.

Q How long is that office open?

A From 8:00 o'clock until 5:00, at least, every day and usually later than that.

Q During the office hours maintained by MTI, to your knowledge, did Mr. Reed or Mr. Holmquist ever try and contact you relative to fair share or any other matter?

A No, sir.

Q Mr. Matthews, how does the MTI operate as it concerns its [47] proposals? Does it seek one hundred percent agreement on every proposal?

A No, it's a majority rule.

Q So that very frequently there may be some people who object to a particular proposal?

A That's correct.

Q I believe you testified that there were two items that were in contention — one was arbitration — third party binding arbitration for dismissal of non-probationary teachers and the other one was agency shop or fair share. Is that right?

A Yes, our proposal was arbitration for all teachers.

Q Now, prior to December 6th had there been discussions and negotiations about arbitration of non-renewals?

A Yes, sir.

Q Had agreement been reached on that particular item prior to December 6th?

A No.

Q Had the Board ever offered to give you or to include the arbitration in the negotiated agreement — arbitration for the dismissal of non-probationary teachers prior to December 6th?

A Not prior to December 6th, no.

Q And did you understand on December 7th that the Board, in fact, on that night had changed it's position and had agreed to give you arbitration of non-probationary teachers?

A Yes, sir.

Q But they would not give you fair share? Is that right?

A That's correct.

Q So to that extent the Board made a change and they made it at December 6th at that Executive Meeting. Is that correct?

A I assume that that's when they made it, yes. * * *

[48] Q Superintendent Ritchie gave you this particular document, as typed, and told you that this was passed by the Board of Education during the meeting of December 6th?

A That's how the meeting was opened the following day. He handed us the document as it is typed and submitted.

Q Would you mark this, please?

* * *

Q Mr. Kops questioned you about a letter you received on November 14th, I believe. Now, I show you what is marked as Union Exhibit No. 10 and ask you if you can identify that.

A This is a letter which there was a direct mailing through the U.S. mail received by most teachers in the

City, apparently, and it says "Dear Fellow Madisonian Educator." This is a copy I got from one of the members of our bargaining unit.

* * *

(Document previously marked for identification as Union Exhibit No. 10 was received in evidence.)

* * *

Q Mr. Matthews, to date have you ever received from either Mr. Reed or Mr. Holmquist a copy of any petition — excuse me, a copy of any petitions?

A No.

Q Have you ever received any data showing the results of the survey conducted by them?

A No.

Q Have you received any information from them?

A No.

Q This petition headed "To: Madison Board of Education and Madison Teachers, Incorporated," dated December 6th that [49] Mr. Kops spoke about, have copies of that petition been given to you or to any member of MTI, to your knowledge?

A A lot of members of MTI got them.

Q I'm talking about when they were filled in and completed.

A No. I received one from one of our faculty representatives on December 6th. That's the last time I've seen it.

Q But the results weren't on it?

A No.

Q I have no other questions.

RECROSS-EXAMINATION OF MR. MATTHEWS BY MR. KOPS:

Q Mr. Matthews, you were present at the meeting where Mr. Holmquist spoke. Is that correct?

A December 6th, yes.

Q And after Mr. Holmquist spoke on December 6th you met with — well, strike that. And you also heard what Mr. Holmquist — the results of that survey that Mr. Holmquist presented at that meeting. Is that right?

A That's correct.

Q And then December 7th you met with the Board of Education, Superintendent Ritchie and Dr. McGrew. Is that correct?

A That's correct.

Q And then after that meeting you agreed to drop your fair share agreement proposal. Is that right?

A I have answered that.

Q Did you or didn't you? You can answer it again, I imagine. Is that right?

A We came to an agreement without it.

* * *

Q You indicated that you haven't received any data from Mr. Holmquist or Mr. Reed. Is that right?

A That's correct.

Q You were present at the meeting on December 6th, weren't you?

A That's correct.

Q And you heard what they had to say concerning the results of their survey. Is that right?

[50] A I heard what they said.

Q And you heard exactly what the Board of Education heard on December 6, 1971 from these people. Is that right?

A That's correct.

Q And then on December 7th you made a tentative agreement with the Board of Education absent a fair share agreement?

A That's correct.

Q Would it be fair to say that the information developed by Mr. Holmquist and Mr. Reed changed your position concerning fair share?

A No, sir.

Q From January of 1971 until October of 1971, did you conduct any poll of your membership concerning the fair share agreement?

A Not between those dates.

Q Did you, after the new law was amended, from October to December 6th, conduct any poll concerning fair share agreement of your membership?

A Would you repeat the question, please?

Q From October of '71 to the time when you reached agreement on the contract with the Public Schools, did you conduct any poll of the membership concerning the inclusion of the fair share agreement in the bargaining proposal?

A It was already in the bargaining proposal — in the bargaining package. It was already in the bargaining package.

Q Did you conduct any poll as to whether or not it should have been removed from the bargaining package of your membership?

A No, sir.

Q I have nothing further.

MR. KELLY: One question, Mr. Matthews.

* * *

[51] Q Mr. Matthews, I've asked that you be recalled because I wished to ask you some questions about what occurred during and after Mr. Holmquist's talk at the Board of Education. When Mr. Holmquist was talking, was he interrupted by any members of the Board of Education?

A Not to my knowledge.

Q Did any member of the Board of Education ask any questions during this talk?

A I don't believe so.

Q Did any member of the Board of Education attempt to stop his talk, to confer with him about what he had to say about the fair share?

A No.

CHAIRMAN SLAVNEY: Was it a unilaterial discussion?

WITNESS MATTHEWS: As they always are. The Board doesn't stop anybody in the Public Appearance section.

Q (By Mr. Kops) Did Mr. du Vair talk also, prior to Mr. Holmquist?

A Yes, sir.

Q During his talk, did anybody ask any questions?

A No, sir.

Q Are you positive of that?

A I don't believe they did. I don't recall that they did.

Q Are you suggesting that no member of the Board of Education asked any questions during the Public Appearance section?

A I don't recall that they did.

Q So then your previous statement is incorrect.

A What previous statement?

Q Whether or not questioning ever occurs in the Public Appearance section.

A It would be a rare occasion that anyone would question during the Public Appearance section until they had finished their presentation.

Q In fact, you don't remember if any questions were asked by [52] any members during the Public Appearance section that evening. Is that right?

A I don't recall that any questions were asked.

Q All right. Now, after Mr. Holmquist finished his presentation, did Mr. Calhoun ask him any questions concerning his presentation?

CHAIRMAN SLAVNEY: Is Calhoun a School Board member?

MR. KOPS: Yes, he is.

A (By Witness Matthews) I don't remember. Not that I recall.

Q Did Mr. Yelinek ask him any questions after his presentation?

A Not that I recall.

Q Did Mr. Marcus?

A None of them did, to my knowledge. Mrs. Doyle stated that she would receive the petitions. That's all she said.

Q Did any member of the Board of Education enter into any conference after Mr. Holmquist's presentation, with Mr. Holmquist?

A Not in the Public Appearance section.

* * *

Q Madison Teachers, Incorporated, during these negotiations with the School Board, did they ever reach impasse?

A Do we ever reach impasse?

Q Did you ever reach impasse in the previous negotiations?

A Yes.

Q When did you reach impasse?

A I don't recall the date.

* * *

[53] Q So, during this period in question, November to December 6th, you were in a position where the parties had reached impasse concerning negotiations for the '72 agreement?

A That's correct.

Q And during this particular time, were you responsible for preparing and distributing to the members of your bargaining unit a document entitled *At Issue?*

A Yes. I testified to that earlier.

Q And I show you — is this a copy of the *At Issue* issue of November 18th?

A Yes.

Q Could I have it marked?

(Document marked for identification as Employer's Exhibit No. 11.)

* * *

Q Now, in the body of this particular document, there is a paragraph — the third paragraph, which reads as follows: "The Administration is attempting to split Madison Teachers' membership by stating the only issue is Fair Share (Agency Shop)." Now, is that a correct reading of that statement?

A That's one sentence of it within the body of the document.

* * *

[54] CHAIRMAN SLAVNEY: Employer Exhibit No. 11 is received. What's the date of that document?

* * *

(Document previously marked for identification as Employer's Exhibit No. 11 was received in evidence.)

* * *

[55] Q I ask you to identify Exhibit No. 12. Is this a facsimile of the *At Issue* issue of November 24, 1971?

A Yes, sir.

* * *

(Document previously marked for identification as Employer's Exhibit No. 12 was received in evidence.)

MR. KOPS: I also would like to have this marked.

(Document marked for identification as Employer's Exhibit No. 13.)

* * *

Q I ask you, Mr. Matthews, is this a facsimile of the *At Issue* issue of December 2, 1971 — I move that this be admitted also.

* * *

WITNESS MATTHEWS: It's one that we produced. I suppose that the date is correct. I haven't looked at that lately. I suppose that that's correct.

* * *

(Document previously marked for identification as Employer's Exhibit No. 13 was received in evidence.)

* * *

Q Now, Mr. Matthews, in this particular *At Issue* document there is a question, "Why does the Administration insist there is only one unresolved issue when there are in fact 13 viable issues in present contract negotiations?" What was that "only one" unresolved issue that the Administration was insisting on?

A Fair share.

Q So, as of December 2nd the Board's position, as you indicated [56] here, was that there was only one unresolved issue and that was Agency Shop?

A That is correct.

Q Were any other *At Issue* documents prepared between December 2nd and December 6th?

A About one every day.

* * *

REDIRECT EXAMINATION OF MR. MATTHEWS BY MR. KELLY:

Q Mr. Matthews, I show you what has been marked as Union Exhibit No. 14 which appears to be *At Issue* for —

A Yes, this is a publication of Madison Teachers underlining [57] the items still viable in negotiations.

Q And *At Issue* is sent to whom, sir.

A It is sent to all members of the bargaining unit.

Q All members of the bargaining unit?

A Yes.

* * *

(Document previously marked for identification as Union Exhibit No. 14 was received in evidence.)

* * *

Q Does the Madison Teachers publish any documents besides *At Issue?*

A *At Issue* is just used during a crisis, specifically for relating events relative to that period of time.

Q Is there any other?

A We publish a newspaper called *The Merrimac* and a periodical, a one or two-page document called *The Reporter.*

Q Who is *The Reporter* sent to?

A It's sent to all members of the collective bargaining unit.

Q Mr. Matthews, I show you what has been marked Union Exhibit No. 15 entitled *The Reporter,* Volume 5, No. 7 and ask if you can identify that for the record?

A Yes, this is the issue that was printed for distribution on November 15th.

Q So this issue was printed for distribution on November 15th and was sent to who?

A All members of the collective bargaining unit.

Q The first paragraph in here is entitled "MTI BRINGS ISSUES TO YOU." What was the purpose of that paragraph?

A This followed an impasse and dispute that arose between Madison Teachers and the Board of Education so we scheduled members of our bargaining committee and our Board of Directors to go to each school to present our position on both issues.

Q Is one of the issues that would have been discussed, fair share?

A It certainly would have been.

* * *

[58] (Document previously marked for identification as Union Exhibit No. 15 was received in evidence.)

* * *

Q What is a Faculty Representative Council?

A It's a body which is made up of the Faculty Representatives from each school who are elected by their school by the members of Madison Teachers in their school on a proportionate basis to the number of members in the building.

Q And what is the job of a Faculty Representative in a particular school?

A They serve as the Representative of those individuals to the official policy-making body of the organization.

Q I show you what has been marked as Union Exhibit No. 16 which purports to be the minutes of Madison Teachers, Incorporated Faculty Representative Council of November 22, 1971 and ask if you can identify that for the record?

A This is a copy of the minutes which were sent out following that meeting.

Q These minutes show that, I quote, "Matthews explained the Fair Share and the Right to Read proposals," et cetera. What particular action of yours are those minutes reviewing?

A I don't understand your question.

Q Well, this describes that you're doing something. What were you doing?

A We reviewed our position in negotiations as it was and there were questions asked — the circulation of the letter from Mr. Holmquist and Mr. Reed under the auspices of Ecology and it brought about many questions in people's minds so we went through and explained what fair share was.

* * *

(Document previously marked for identification as Union Exhibit No. 16 was received in evidence.)

[59] * * *

Q I show you what's been marked as Exhibit No. 17 which is the minutes of Madison Teachers, Incorporated Faculty Representative Council of November 16th and ask you if you can identify that?

A This has to do with the Council meeting which was held at LaFollette. This was a regular Council meeting and the minutes of that particular meeting.

Q All right. What do those minutes indicate relative to Mr. Holmquist?

A There were various questions asked of us concerning the letter which was sent out by Mr. Holmquist and Mr. Reed and the Representatives asked various questions of us and this is a summary of what took place.

Q In other words, that's a summary of what took place at the Faculty Representative's Council relative to the Reed-Holmquist letter of November 14th? Is that correct?

A That's correct.

* * *

(Document previously marked for identification as Union Exhibit No. 17 was received in evidence.)

MR. KELLY: I have nothing further.

MR. KOPS: Just one question concerning the minutes of November 22nd. When were they distributed to the membership?

WITNESS MATTHEWS: I couldn't say specifically. The minutes of the Faculty Representative Council go to

all members of the bargaining unit as soon after the meeting as possible but that meeting was a very short meeting and I assume they went within a couple of days.

MR. KOPS: Could it be that the minutes of the 22nd where the fair share was explained was distributed after agreement on December 8th?

WITNESS MATTHEWS: I wouldn't think so.

MR. KOPS: You don't know, though?

WITNESS MATTHEWS: Our practice is to distribute them as quickly after the meeting as possible and at that time I couldn't say for sure, but from the length of them I don't think it would take that long.

[60] * * *

MR. KELLY: Mr. Speerschneider.

MR. JAMES E. SPEERSCHNEIDER having been called as a Witness by Counsel for the Complainant and having been duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION OF MR. JAMES E. SPEERSCHNEIDER BY MR. KELLY:

Q Would you state your name for the record?

A James E. Speerschneider.

Q Are you employed, Mr. Speerschneider?

A I'm a Counselor at Memorial High School.

Q Are you involved in any activities of the Madison Teachers, Incorporated?

A I'm presently a member of the Negotiating Team and at the time this contract was negotiated, I was Chairman of the Negotiating Team.

Q How long were you Chairman of the Negotiating Team?

A Two years.

Q Did you serve as Chairman of the Negotiating Team during the negotiations that led up to the 1972 contract?

A Yes.

Q When did those negotiations start, to the best of your knowledge?

A About Janaury 25th — I guess somewhere around there.

Q Did you submit to the Board of Education, at some time, a written proposal to be considered at the bargaining table on behalf of MTI?

A Yes.

Q Was a part of that proposal fair share?

A Yes, number eighteen.

Q As Chief bargainer, when did you conclude that fair share was definitely denied and would not be part of the contract arrived at for 1972?

A December 6th or 7th when I got — December 7th when I got a report back from John that a potential agreement had been reached.

Q Who comprises, or who do you deal with on the other side of the — who's Chairman of the Board's team?

[61] A Paul Olson.

Q At any time prior to December 6th, was there indication that the Board was flexible on the issue of fair share?

A Yes, there was. When we got near impasse and asked for mediation, Paul and I met one evening over at Midvale School.

Q By "Paul" who do you mean?

A Mr. Olson, to see if the two Chief Negotiators might not work out some kind of compromise position. We

discussed very candidly the issues that were at hand and what might be given by both sides. Unofficially, at that time, Paul indicated to me that he could see no way in which binding Arbitration for non-renewal and dismissal would be granted by the Board of Education but that there would be a distinct possibility that Agency Shop could be granted by the Board of Education.

Q Did you attend a meeting of the Board of Education in a regular meeting held on December 6th?

A Yes, I did.

Q Were you there during that portion heretofore noted as Public Appearances?

A Yes.

Q Did you hear Mr. Holmquist speak during that period of time?

A Yes, I did.

Q How long would you say he spoke to the Board?

A A short period of time — less than ten minutes. I'd say maybe about five minutes.

Q What, to the best of your recollection, did Mr. Holmquist say to the Board on that occasion?

A That he was representing some teachers and submitted a petition to the Board, or at least said he had a petition in his hand which he was going to submit at a later date asking for a postponement of Agency Shop — a study, sort of a year moratorium on it.

Q As Chief Negotiator for MTI, do you involve yourself in the strategy of the collective bargaining process?

A Very definitely.

Q As Chief Negotiator for MTI, what was your feeling after that particular meeting?

* * *

[62] A (By Witness Speerschneider) I thought it was the most damaging thing to our strategy that could occur or that had occurred in the last two years that I was Chairman.

Q (By Mr. Kelly) Why did you feel that way?

A It underminded the strategy that we were attempting in order to obtain, in negotiations and collective bargaining, the end results of a certian contract that we wished to have. It hurt us drastically.

Q Did any other teachers that were present that night express themselves to you relative to this matter?

A Yes. Several teachers, although I couldn't recall their names that evening, and the next day in school, approached me indicating that it was the thing that obviously hurt our position in bargaining.

* * *

CROSS EXAMINATION OF MR. SPEERSCHNEIDER BY MR. KOPS:

Q Mr. Speerschneider, when did this meeting with Mr. Olson occur?

A I would say the latter part of October or the early part of November.

Q That was before fair share was legal, is that it?

A Yes, but it looked like 198A was just about sure to pass.

Q Subsequent to that meeting, did Mr. Olson meet with the Board of Education?

A Yes.

Q And as a result of the meeting of the Board of Education, were there any communications distributed to you?

A Yah, they turned down — we had some seven or eight items that we thought we could reach agreement on. Together they turned down something like four to six of them.

Q When did that occur?

A Within a week after that meeting.

Q All right. Now, that happened in October. Is that it?

A October or early November.

Q All right, and within a week of that meeting if it was late October or early November, you had an answer from the Board of Education indicating that fair share was out. Is that right?

A Right.

[63] Q So, this Mr. Olson's conclusion concerning the position of the Board of Education with regard to the fair share was incorrect. Isn't that right?

A Yes, and with regard to binding arbitration also.

Q So, in other words, there appeared at least as far as early November was concerned, that the fair share was not a possibility for inclusion in the negotiated agreement for '72. Is that right?

A I really couldn't say that. When you're in negotiations and working things, a lot of times "no" comes up when they mean "yes" and his indication to me in private was that there was a far better chance for fair share than there was for binding arbitration.

Q All right. However, prior to November 6th and even prior to the fair share portion of the legislation in '71, you knew that both binding arbitration and the fair share were refused by the Board of Education?

A We knew a lot of things were refused by the Board of Education that we eventually got in the bargaining process. That's normal.

* * *

A (Interrupting) I think there were a lot of other things that they turned down that they eventually came up with so that's a part of bargaining. That's not an absolute yes or no answer.

Q You met with Paul Olson in late October or early November?

A Yes. He indicated at that time that he thought that fair share was a possibility. Is that correct?

A Right.

Q Then, subsequent, about a week after that meeting, you were given the answer concerning his proposal to the Board of Education. Is that right?

A That's correct.

Q And that answer was a denial of fair share, was it not?

A That's correct.

Q Okay. Now, was Mr. Waldman a member of your negotiating team?

A No.

Q What was his position in November of this year with MTI?

[64] A A member of the Board of Directors, I believe.

Q And he was a member of the Board of Directors during the entire negotiating session?

A When we submitted the original document for negotiations, I believe he was President of MTI.

Q I see, and then you changed over Presidents after that date?

A Yes.

Q I imagine Mr. Waldman also thought that this Agency Shop was a vital issue in negotiations. Is that right?

A I couldn't answer for Mr. Waldman. Ask him.

Q Do you know?

A I don't know.

Q You indicated also that this five-minute statement by Mr. Holmquist was the most damaging of anything that had ever happened during negotiations to your strategy, at least in the time that you've been on the negotiating team. Could you explain to us how it damaged your strategy?

A Do I have to answer that? I think that involves a tactic that we were using at that time and I'd hate to go into that unless I have to.

* * *

Q (By Mr. Kops) All right. Would you answer the question?

A (By Witness Speerschneider) We were attempting in negotiations, to indicate which items were of very great importance to us and of primary importance to us where binding arbitration and non-renewal and dismissal, the second most important item to us, was Agency Shop. We had settled several other items — salary and other items like this and we had a whole bunch of things settled but it didn't make much difference and these were the two important items.

We wanted the Board, at all times, to understand that the most important item, as far as we were concerned, was [65] Agency Shop and not the other one. They bought that. Then, when Mr. Reed and Holmquist got up and made the statement they cut our most important strategy element right out from under us.

Q I still am not clear as to how they cut your strategy out from under you.

* * *

WITNESS SPEERSCHNEIDER: Our agreement with the Board of Education indicates that they will negotiate with me and my team and no one else and when they listened to them, they were negotiating with them and someone else and I objected.

* * *

CHAIRMAN SLAVNEY: Now, there are some teachers in the school system that are not members of your organization. Is that right?

WITNESS SPEERSCHNEIDER: That's right.

CHAIRMAN SLAVNEY: And they are not on dues check-off. Is that right?

WITNESS SPEERSCHNEIDER: Right.

CHAIRMAN SLAVNEY: Would this give the School Board knowledge as to which of its teachers are members of your organization and which are not?

WITNESS SPEERSCHNEIDER: I think they know that already.

* * *

Q Mr. Speerschneider, check-off is not the only way that dues are paid, are they?

[66] A No.

Q So, people can pay their dues directly to MTI?

A Correct.

Q Instead of being checked off?

A If they like, right.

Q So check-off would only indicate — or, be a partial listing of members. Is that it?

A Yes.

* * *

Q Mr. Speerschneider, after you heard the statement made by Mr. Holmquist, was there some statement in your mind as to whether or not the membership of the bargaining unit indeed wanted fair share in the agreement?

A Total membership?

Q Well —

A There was some question in my mind at all times that everyone wanted fair share.

Q All right. Now, after you heard Mr. Holmquist talk, did it appear to you that perhaps a dissent concerning fair share was greater than what you anticipated?

[67] A No. He never presented any signatures to me and the Board of Education never presented any signatures to me. All I have is his figure of some seventy-odd people had signed it.

Q After he made the statement at the December 6th meeting, did you think it would be wise for MTI to poll the membership concerning fair share?

A Um-um, because the law reads they have to vote on it and we need something like sixty percent before it goes in and that would be the poll.

* * *

Q Now, Mr. Speerschneider, are you indicating that this talk of Mr. Holmquist's strengthened the Board's position or weakened your position?

A Both.

Q Were you aware of your membership? Did the membership express to you, or after this conference, dissatisfaction with the fair share proposal? After the December 6th meeting did any teachers in the bargaining unit which were members of MTI suggest a change in MTI's position concerning fair share?

A Oh, I couldn't recall before or after. I just couldn't answer that.

Q So, your conclusion with regard to what effect this statement had is not based on any empirical evidence concerning your membership but only a feeling on your part, is that it?

* * *

A (By Witness Speerschneider) You asked me my opinion and [68] at that time I gave you my opinion.

Q (By Mr. Kops) But there was no feedback from your membership concerning this issue after Holmquist spoke?

A I really can't recall that because we reached settlement on the 7th or 8th, the settlement was in and we had it out. I'll retract that. Immediately after the meeting, the next morning at school teachers talked to me about it indicating that it did damage.

Q How did they indicate to you that it did damage?

A I had talked to them concerning negotiations. They knew something regarding negotiations as members and they realized that it hurt when part of the group jumps up front and chops off what you're asking for.

Q Now, who were these people that talked to you December 8th?

* * *

[69]Q Mr. Speerschneider, during Mr. Holmquist's talk, did any member of the Board of Education interrupt and engage in a discussion with Mr. Holmquist?

A I don't believe so but I'd have to go to the minutes. I don't think so.

Q After the talk of Mr. Holmquist, did any member of the Board of Education engage in a dialogue with Mr. Holmquist concerning the results of the survey he conducted?

A Again, I don't know. Not to my knowledge.

Q Is Mr. Holmquist a member of MTI?

A I have no idea.

Q Do you know if Mr. Holmquist is a member of a minority Union?

A I have no idea about that either.

* * *

REDIRECT EXAMINATION OF MR. SPEERSCHNEIDER BY MR. KELLY:

Q Did Mrs. Doyle speak after Mr. Holmquist spoke to this issue, to your knowledge?

A Yes, I believe she made some comment to the extent that she would receive or accept the petitions when he had them.

* * *

* * *

[70] MR. KOPS: Do you recall any other person making a comment?

WITNESS SPEERSCHNEIDER: A lot of teachers. I was in the audience.

RECROSS-EXAMINATION OF MR. SPEERSCHNEIDER BY MR. KOPS:

Q What comment did the teachers make after Mr. Holmquist spoke?

A Many of them were disturbed.

Q Well, was this noticeable during the meeting?

A No. They were very polite at that time.

Q Now, just a minute. You said there were many teachers who made statements or made comments.

A Two or three of the bargainers were sitting next to me and made comments to me about it and a couple of other teachers in the room said something to me about it.

Q There was no general uproar or anything at the meeting after Mr. Holmquist talked?

A There was no general uproar at any time. They were very polite at that meeting.

* * *

[71] MR. KOPS: I'll call Albert Holmquist.

MR. ALBERT HOLMQUIST having been called as a Witness by Counsel for the Respondent and having been duly sworn on oath, was examined and testified as follows:

* * *

Finally, also I move to dismiss with the same argument that a denial by the Board of Education of allowing a citizen of the United States and also a teacher to state his position concerning the fair share — state a position to the Board of Education and Madison Teachers, Incorporated. To prevent them would be a violation of an individual's civil rights, specifically United States Constitution, Article I, and the Wisconsin Constitution and, [72] the new law, 111.70.

CHAIRMAN SLAVNEY: We will reserve ruling on your motion.

DIRECT EXAMINATION OF MR. ALBERT HOLMQUIST BY MR. KOPS:

Q Would you please state your name?

A Albert M. Holmquist. I reside at 5626 Crestwood Place, Madison.

Q And by whom are you employed?

A I'm employed by Joint School District #8, Madison Public Schools.

Q And are you a member of Madison Teachers, Incorporated?

A I am not presently a member of Madison Teachers, Incorporated. I'm an ex-member of Madison Teachers, Incorporated.

* * *

A (By Witness Holmquist) I'm not a member of Madison Teachers, Incorporated. I was, at one time, a member of Madison Teachers, Incorporated.

Q Are you a member of the American Teachers Federation?

A I am not.

Q Are you affiliated with any labor organization which presently has members in the Madison Public Schools?

A No.

Q Mr. Holmquist, you made a statement on December 6, 1971 before the Board of Education concerning the fair share agreement. Is that right?

A That's correct.

Q Now, prior to that statement before the Board of Education, when was the first time that you became involved with the fair share issue?

A I became aware of it in late September or early October.

Q And how did you become aware of it?

A The MTI Faculty Representative at the school was badgering me about why I wasn't a member and at that point — and during one of these conversations — they were numerous, the issue of fair share was brought up and that's my first recollection of being involved in this at all.

Q All right, when was the next time that the matter of fair share — that you became involved in the matter of fair share?

A In conversations with Mr. Reed.

Q When did that occur?

[73] A These were in the first weeks of October.

Q And where did that occur?

A That occurred at his home, at mine and at a class we were both taking — after a class.

Q And out of these discussions, what occurred?

A Out of these discussions we came to the conclusion that Madison teachers were very confused about what Agency Shop, Union Shop, fair share might be.

Q And on what basis did you come to the conclusion that teachers might be confused concerned this?

A The very limited basis of speaking to the faculty members at the schools we are both employed at.

Q And could you specify the nature of this confusion and what resulted from your conversations with these representatives?

A The confusion stemmed from the definition of what each of these terms actually meant. The common understanding of fair share that I found was in my own faculty — was that each member would pay a certain proportion of the local dues to the local organization and this constituted fair share.

Q And did you question your Faculty Representative concerning your interpretation of what fair share meant?

A I asked the Faculty Representative to go back to the Representative Council and ask what fair share meant, as it was being negotiated or might be on the negotiating table.

Q And did you receive a reply from the Faculty Representative?

A The reply was virtually all. I asked then, virtually all of what, and the answer was membership for the unified membership of the local, state and the NEA, all three affiliates.

Q So, you found out, after questioning this representative, that it meant total dues for MTI, total dues for WEA and total membership and dues to NEA. Is that right?

A Ninety-five dollars, yes.

Q Now, after you found this out, what action, if any, did you take?

A Another discussion with Mr. Reed ensued and we decided that we might like to get a letter out to teachers and find out what their opinion was — in general, all teachers.

Q Then what action did you take?

[74] A At that point we got into the strategy and we thought that one way to start might be to find a listing of non-MTI members because they might have this feeling opposing agency shop and one hundred percent. We contacted the Administration. I spoke to Mr. McDaniels of the Business Office and asked him if we might have a copy of the dues check-off list.

Q What was his reply?

A His reply was that he would check into it and let us know. He called me back within an hour and a half and told us he could give us no information whatsoever.

Q What did he give you as a reason?

A The reason was — I argued with him that these were public records, the pay records, and that we should be able to examine them and his answer was that the pay records themselves were spin-offs of — in IBM terms, I

guess, not the actual documents, but were spin-offs of other pay documents and as such might not be public records and he was unwilling to give them to us.

Q Then what action did you take?

A At that time we decided how much money we had and decided to make a general mailing of the first letter to all teachers who were listed as staff members, not administration and non-certified employes — what's the word? Non-certified employes.

Q Where did you get a list of the teachers in order to make this general mailing?

A In the fall all teachers are supplied by the Public Information Office of the Board of Education, a listing of all of the teachers and their addresses.

Q So, after you asked to examine the check-off list in the Business Office of the Board of Education, you used the directory to mail to the teachers. Is that it?

A Yes, sir.

Q Now, when you decided to do a mailing, what did you decide to mail and when?

A Mr. Reed and I drafted various letters and agreed on a letter about November 10th or 11th, I believe, and we had it printed. It's the letter, I believe, that's been admitted as an Exhibit.

[75] Q Is this it?

A Yes.

Q That's Exhibit No. 10 and was it you and Mr. Reed who developed this? Is that it?

A Yes, exclusively.

Q I notice that there's a mailing address. What mailing address is that?

A That mailing address is a post office box at the Hilldale sub-station.

Q Did you and Mr. Reed apply for that post office box?

A Yes, we applied for it under the name of ECOLOGY.

Q So this letter was a general mailing to all teachers. Is that correct?

A All employes covered by the bargaining agreement. It includes Social Workers and Psychologists and many other professionals.

Q When did this go out?

A This was mailed the 14th of November.

Q And what, if any, reaction did you have to the letter?

A We received approximately two hundred replies.

Q After you received the two hundred replies to the letter, what action did you take?

A After we received the replies we decided that since the great majority, being favorable, that we might like to see if this issue could be articulated further.

Q What action did you take?

A Then, at that point we called a meeting together of the teachers who had signed on the return of the letter that they would work actively. We called them together.

Q And where and when did this meeting take place of the teachers that replied to your initial letter?

A This meeting took place on the Thursday previous to December 6th. I don't have the exact date.

Q Where did this meeting take place?

A This meeting took place in the Community Center at Eagle Heights.

Q And who all attended the meeting?

A The meeting was attended by fourteen teachers in the Madison School System, seven of them MTI members and seven of them not.

[76] Q So at the meeting on the Thursday prior to December 6th, fourteen people attended the meeting, at your call, seven of which were MTI members?

A That's correct.

Q What was the purpose of the meeting and what took place?

A The purpose of the meeting was, first of all, to discuss the issue. We felt that due to the great confusion that we felt had been evidenced in Mr. Reed's and my own faculty and our resulting mail finding, we thought that since there was confusion and since 198A had just been recently passed we would like both MTI and the Board to put off this issue until the teachers could be informed and know exactly what it is they were doing before they did it.

Q All right. What developed out of that particular meeting?

A Well, what developed out of that meeting — two things. Number one, the so-called petition —

* * *

Q I show you what's been marked as Employer's Exhibit No. 18 and ask you to identify it.

A This is the petition that was drawn up by a group of fourteen people as transcribed by one of the teachers who was the secretary of the group for that meeting.

* * *

(Document previously marked for identification as Exhibit No. 18 was received in evidence.)

* * *

Q What else was discussed at that meeting?

A At that meeting a list of pertinent points of information regarding this issue was made.

Q You say the meeting was the Thursday before December 6th. Is that it?

A That's correct.

Q It was December 2, 1971. Is that right?

[77] A Yes.

Q What else developed out of that meeting?

A A listing of the points of information as understood by the people, the fourteen people who were present, to accompany the petition as it went into schools.

Q All right. Now, this was developed by the fourteen people in attendance at the meeting. Is that it?

A Yes.

* * *

Q Okay, I show you what's been marked as Employer's Exhibit No. 19 and ask you if you can identify it.

A Yes, this is a copy of the points of information as of that date.

* * *

(Document previously marked for identification as Employer's Exhibit No. 19 was received in evidence.)

* * *

Q Was anything other than those two Exhibits developed at the meeting of December 2nd?

A At the meeting we also talked about the logistics, how we would circulate these in the schools. The group made the decision that the results, the first day of results would be communicated to both Madison Teachers, Incorporated and the Board of Education.

Q Now, Mr. Holmquist, when you talk about the first day's results, this meeting was on a Thursday and what were your intents concerning the petition and circulation?

A Our intents were to get it into the schools on Monday. It was already late Thursday night and there was no way to do it Friday, much less contact someone to carry the petition to all schools by the next morning.

Q Now, that was your intent. What logistics did you arrange through these fourteen people concerning the logistics?

A These fourteen people were to take the petition to their own schools. They would attempt to find people at other [78] schools who would take the petition and this was to be done over the weekend — Friday night, Saturday and Sunday.

Q All right. When the meeting broke up were any other letters or anything prepared by members of the committee?

A No. There was another letter that I prepared the following evening about the logistics that had been decided on.

Q All right. Did this letter also accompany the two documents that were developed at the Thursday night meeting?

A Yes, it did.

* * *

Q I show you what's been marked as Employer's Exhibit No. 20 and ask you if you can identify it?

A Yes. This is a cover letter to go with the information letter and the petition. It speaks of ways the information letter and the petition might be circulated and used. The only thing missing is the telephone number. On that line, either Mr. Reed's or my telephone number appeared. We split them in half.

* * *

(Document previously marked for identification as Employer's Exhibit No. 20 was received in evidence.)

* * *

Q After you had prepared the petition and the points of information and the cover letter, how were these things reproduced?

A We paid a printer.

* * *

Q And after you had them reproduced, what action did you take with the documents you prepared?

A Oh, the documents, as many as we had definite mailing [79] addresses for by late Saturday evening, were mailed to these people — I'm sorry — by late Friday evening, were mailed to these people so they could receive them Saturday. Those were put in the mail approximately at 4:00 a.m. Saturday morning. The schools that we did not have a contact at at that time, the information was hand delivered on Saturday and Sunday.

Q Now, you're talking about mailing this material to people. How did you know who to mail it to in the different schools?

A Well, the fourteen people who were at the meeting and people were called and they supplied a friend's name in another school and we were able to get a contact in all but one school.

Q And you say that all of these documents were in the hands of the people who were to circulate this petition and other information by Monday morning? Is that it?

A All except — well, by Sunday evening except for one that I did mail to an individual teacher at a school simply because I didn't want to hand deliver it out to Sun Prairie on Sunday night. So, he got it Monday afternoon.

Q Were there any schools where the information was not mailed to?

A Well, that was the only school with an actual mailing to a school address.

Q Was there any other school that didn't receive this information?

A There was one school that did not have any contact and that was Sandburg School.

Q Okay, now after the information was distributed, what were the individuals who received the information to do with it?

A They were to attempt to inform, first of all, teachers of the points of information that we had to date on this issue. At that point, if the teacher wished to sign the petition to express their feeling of confusion and wanting to have this issue straightened out and wanting to have it all straightened out publicly, they were able to sign. The petition was to be carried in non-teaching time during the school day.

Q Now, the Board meeting was to be held December 6th, wasn't it?

A Yes, it was.

Q How were you going to get the results of that — of your work [80] before the Board meeting?

A On the last letter that was introduced, the cover letter, when I spoke of the missing telephone number — the telephone numbers were Mr. Reed's and my own home addresses, as our wives were answering the telephone between a specified period of time the teacher who was circulating was to call into that number the first day the number of people who had been contacted to potentially sign and the number of actual signers in the schools.

Q Now, you got involved in this matter, you said, in October and November. After you first sent out your ECOLOGY letter, do you recall any strange incidents or find any strange things in your mailbox as returns?

A Yes.

Q What did you find in your mailbox besides your replies?

A In my own personal mailbox — how does one say dog shit euphemistically? I'm not sure, but there was a plastic bag of it in my mailbox. There were also some interesting letters in response to the ECOLOGY letter that came to the post office box.

Q And were these letters signed?

A Some were and some weren't.

Q Did you receive a letter from John Waldman?

A Yes, I did.

* * *

Q I show you what has been marked as Employer's Exhibit No. 21 and ask that you identify it.

* * *

Q Employer's Exhibit No. 21 is before you. Is that the letter you received from John Waldman?

A Yes, it is.

* * *

[81] (Document previously marked for identification as Employer's Exhibit No. 21 was received in evidence.)

* * *

After the meeting of December 2nd and between December 2nd and December 6th, did you receive any communications from Madison Teachers, Incorporated?

A None that I recall.

Q All right. Now, when it came time for December 6th, what was — you intended to speak on December 6th. Is that it?

A On December 6th we intended to present to both groups that were at the bargaining table — well, we intended to present to both groups the first day's results of the teachers' exposure to this information petition.

Q And would you explain to the Board members the reason why you were motivated to take this survey and also to present the results of the survey to the parties involved in the negotiations?

A I was motivated initially by my feeling when I asked what fair share was. It was one hundred percent unified membership. I did not favor that. I favored paying a fair share local membership. If I had been told that that was seventy-five or eighty percent I would have paid it and not have had any concern whatsoever with the issue.

However, in talking to other faculty members in my school and speaking with Mr. Reed and colleagues in other schools, I discovered there was, indeed, great confusion on what Agency Shop was, what Union Shop was and what 198A and 111.70 was and I didn't think that we wanted to — on reading 198A and finding out that it took a majority vote to remove a bargaining agent, I thought that — and this was not common knowledge as were a lot of other things, and I thought teachers ought to know before making such a monumental decision and I didn't feel that they really knew what was going on and that was my position.

[82] Q Okay, when did you go to the Board of Education on December 6th?

A I arrived there at approximately 6:00 p.m.

Q And when you arrived at the Board of Education, did you meet with Mr. Reed?

A I did not.

* * *

A (Interrupting) I left Mr. Reed at the class. I had left early and left Mr. Reed to finish taking notes for both of us.

Q Then you proceeded to the Board of Education about 6:00 o'clock for the meeting and he was to meet you there later?

A Yes, he was.

Q When you arrived at the meeting of the Board of Education, what did you observe?

A When I arrived I observed an almost deserted building — no one in the parking lot, on the streets or in the building from what I was able to observe.

Q Were there any teachers in the vicinity of the entrances of the building?

A When I arrived at the building, no.

Q And what did you do when you arrived at the building?

A I went into the auditorium and looked around. I was hoping that I would get to speak and just wanted to stand there for a minute.

Q Who was the first person that you came in contact with when you arrived at the Board of Education?

A I said hello to a custodian who happened to be in the auditorium and was adjusting the heat at the time.

Q Okay, who was the next individual you talked to?

A The next individual was Mr. Waldman.

Q Mr. Waldman?

A Yes — oh, I'm sorry. Excuse me — Mr. Matthews.

Q Where did you have a discussion with him?

A In the front of the auditorium — near the front of the auditorium.

Q Was there anybody else there during your discussion, your initial discussion with Mr. Matthews?

A The room was deserted.

Q And what do you recall of that conversation with Mr. Matthews?

[83] A I recall, first of all, asking him if he were aware of the fact that there was a petition in the school.

Q And what was his reply?

A His reply was that he was aware and he did have a copy of it.

Q He had a copy of the petition?

A He stated he had a copy of it. I presented him with another copy of it at that time and informed him that I would be presenting it before the meeting with the number of signatures, the first day's signatures.

Q You would be presenting it to who?

A To himself before I presented it to the Board of Education.

Q And what was Mr. Matthews' reaction, if you recall?

A To that particular statement, none. We then discussed several other topics

Q All right. Then what? Did you part ways or —

A Well, at that point, yes. We both went out opposite ends.

Q And when did Mr. Reed arrive?

A Mr. Reed arrived about 6:20 or 6:30, I believe.

Q And was this after the conversation with Mr. Matthews?

A This was after the conversation with Mr. Matthews.

Q And what did you and Mr. Reed do after he arrived?

A Well, we phoned our wives.

Q And where did you go to phone your wives?

A Before Mr. Reed arrived, I walked in the back door of the Curriculum Department office and wanted to retype my remarks for the Board of Education that evening.

Q Did you receive permission to enter the office from anyone from the Administration or the custodian there?

A No. There was no one there at that time. I walked past the custodian who was mopping the floor at the other end of the office. He didn't speak to me. I sort of feel at home there. I serve on five curriculum committees and I'm down there frequently for meetings.

Q Now, you entered the office and retyped your speech. Is that it?

A That's the first thing I did, yes.

Q Then after that what happened?

A After that Mr. Reed arrived. I went out in the hall and talked to him and we talked and then two conversations ensued with members of MTI.

[84] Q You say you talked. Where — did you go anyplace to talk?

A We talked in the Curriculum Office.

Q You went to the Curriculum Office then, after you met him. Is that it?

A Yes.

Q While you were in the Curriculum Office, what did you do?

A I used the typewriter and telephone.

Q And did you receive the results from your wives to the petition in the Curriculum Department?

A Yes, we did.

Q And while you were receiving these results, what occurred?

A While we were receiving the results and waiting to phone, there was a knock on the door.

Q And what, if any, action did you take concerning the knock on the door?

A We ignored it. We were on the telephone, both of us, at the time.

Q What was the next thing that occurred?

A The next thing that occurred was that the door opened and Mr. Matthews and Mr. Mason came in.

Q What, if any, conversation ensued at that particular meeting?

A The conversation was mostly with Mr. Reed. I was having difficulty getting through to my wife. The phone was busy with other people calling her and I excused myself after a few moments. One of the things that was talked about while I was present was that we were questioned why we had taken to publicly present this before MTI? Why didn't we go through our legislators if we weren't happy with 198A.

Q And what was your reply to that?

A My reply to that was that question at the present moment was moot. The Bill had been passed.

Q And that's when you left. Is that it?

A That's when I went to dial the telephone, yes.

Q And the conversation continued with Mr. Reed? Is that it?

A Yes.

Q After you returned to Mr. Reed had Matthews and Mason left?

A Yes.

Q And you continued to gather results of the survey. Is that it?

A That's correct.

[85] Q And as you were continuing to gather results, did any further meetings or discussions occur?

A Mr. Matthews and Mr. du Vair and Mr. Mason came back.

Q They came back to the Curriculum Department?

A That's correct.

Q And did further discussion ensue concerning your proposed activities that evening?

A Yes, it did.

Q And what was the nature of those discussions?

A The nature of the discussions were the request by them that we not present our information to the Board of Education and secondly that there was a discussion of the two items that were on the bargaining table, the fair share and the nonrenewal, arbitrary binding —

Q (Interrupting) What do you mean, there were some discussions concerning that?

A At one point they offered to —

Q (Interrupting) Who is "they"?

A Mr. Mason and Mr. du Vair and Mr. Matthews. They said that our presenting of the results was really not necessary. That the fair share agreement had been changed from the language that was on the table and they indicated there might be a trade-off for the two issues and were about to show us the actual documents that had been used at the bargaining session and —

Q (Interrupting) What do you mean, they were "about" to show you?

A They offered to show us and then they decided not to.

Q They offered to show you the documents that were being used in negotiations?

A They spoke that there had been a change in the Agency Shop agreement and that we might like to be aware of what that was before we spoke to the Board of Education.

Q Did they indicate they would make you a party to what information they had if, in fact, you would not attempt to speak before the Board of Education?

A The offer was not direct, no.

Q All right. After the meeting — what did you indicate to them during this discussion?

A We indicated it was our intent to present to both MTI and [86] the Board the results of this first day's petition.

Q Did they indicate that they were interested in what the results of your survey were?

A Yes, they did.

Q When did you indicate that you would give them the results of the survey?

A As I said earlier, I indicated to Mr. Matthews that I would present him the number before the meeting started.

Q Now, after they left, did you complete gathering your statistics from your wives?

A Yes, we did.

Q And was this prior to the Board of Education meeting?

A Yes, it was.

Q And at that time, what did you do?

A At that time we returned to the auditorium.

Q And when you returned to the auditorium, what did you do?

A I took another blank copy of the petition and wrote on the top of it, "N=417" and placed it on top of Mr. Matthews' books.

Q In the auditorium?

A Yes.

Q What did that number mean?

A That number was the total number of signers we had gotten on the first day as totaled up. We also did use an adding machine in the Curriculum Department office and totaled up as reported by our wives which was phoned in by the teachers in the schools.

Q And this information was then placed on Mr. Matthews' seat? Is that it?

A Yes. We looked for him in the auditorium but he, apparently, was out with the troops.

Q All right. Now, what did you do in order to register to speak at the meeting?

A Prior to the meeting, the start of the meeting, Mr. Mintener —

* * *

A Mr. Mintener, the Director of Public Information, passed out cards to all people who wished — cards to fill out for all people who wished to speak to the Board. There was a public hearing that night and the public attended also because of the proposed budget cuts which were being announced that day.

[87] Q How did you register to speak?

A I put my name on the top of it and the bottom where it indicates whether or not you wish to speak or whether to register an opinion on an issue. I checked off that I wished to speak.

Q Did you indicate on the registering form what you wished to speak about?

A No, I did not.

Q Now, after you registered and were taking your seat, what, if anything, did you observe concerning Mr. Matthews activity when he entered the auditorium?

A He took his seat at the start of the meeting and I observed him pick up the petition with the numbers on it and look at it with the number on it.

Q Okay, now you were present during the entire Public Appearance section of the Board of Education meeting. Is that right?

A I was present until adjournment of the meeting, yes. I was present for the entire meeting.

Q Now, during the Public Appearance section, a number of people spoke, did they not?

A Yes, they did.

Q And during the time the people were speaking, did the Board of Education, members of the Board of Education interrupt and ask questions and engage in discussions with these people?

A With many of the people, yes, they did.

Q And were you present when Mr. Du Vair spoke?

Q And during the time when Mr. du Vair spoke, did any of the members of the Board of Education ask questions of Mr. du Vair, if you recall?

A I believe not.

Q And do you remember the nature of Mr. du Vair's comments?

A Mr. du Vair expressed the wish that he could go home for Christmas and that the negotiations, indeed, be settled and also presented a petition saying let's get back to the bargaining table. It was signed, I believe, by fifteen hundred teachers.

Q And the petition indicating "let's negotiate" was then [88] presented to the Board of Education?

A Yes, they were.

Q And after Mr. du Vair finished, what occurred?

A My name was called to speak and I spoke.

Q Now, did you take any special precautions concerning what you said and making notes of what you said at the December 6th meeting?

A Yes, on the advice of my wife, who informs me I sometimes get a quiver in my voice when I'm speaking publicly, she suggested that I write down what I was going to say and I, indeed, did write this down. As a matter of fact, that's what I was typing in the Curriculum Office just prior to Mr. Reed's arrival.

Q Did you then read the statement to the Board and to the members of MTI that were seated in the audience?

A Yes, I did. I read it verbatim and I added one additional comment and a heckler spoke from the audience.

Q Would you read what you read at the December 6th meeting to the Commission, please?

A Yes. "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers, Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package. If I may read it:" Then I read the text of the petition itself.

Q Do you want to read it?

A It's dated December 6, 1971. "To: Madison Board of Education, Madison Teachers, Incorporated. We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers, Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract [89] agreement for their opinion on the fair-share proposal. 4) The results of this written ballot be made public." Then I stated, "We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc., which speaks euphemistically about the 'whole package' and therefore is not issue specific... Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it.

"For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ..." At this point I was interrupted by a heckler.

Q What did the heckler say? Do you remember?

A It was a guffaw.

Q What was your response?

A I reminded that it was a majority. I continued, "... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself,

but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation."

Q Is that the end of your statement?

A Yes.

Q And what then happened?

A At that point there was silence for approximately fifteen seconds and Mrs. Doyle asked a question.

Q What did she say?

A Her question was, "Do you intend to communicate these petitions to the Board when you have them all?" My answer was yes.

Q Have you, in fact, presented the petitions to either Madison Teachers, Incorporated or the Madison Board of Education?

A Not to this date.

Q So the only thing that was presented to both parties was the result of the survey that was taken on December 6th. [90] Is that right?

A That's correct.

Q Now, during this entire period of time, Mr. Holmquist, from the time that you got involved in this in October until the December 6th meeting, did you have any discussions concerning this matter with the Board of Education?

A None whatsoever.

Q Did you have any discussions with Madison Teachers, Incorporated concerning this during that period of time, from October until December 6th when you met with John Matthews?

A Yes, there were two contacts. One was the contact with my own Faculty Representative that I spoke of before,

and the other — there were two, possibly three other phone calls I received from MTI members asking the results of the first — the ECOLOGY letter, that the results of this letter, this mailing, be presented to MTI rather than the Board.

Q Well, did you present the results of your first mailing to MTI?

A No, I did not.

Q But, in fact, MTI members were at the meeting, the organizational meeting the Thursday before the December 6th meeting. Is that right?

A Yes, they were. I think many of the persons who signed the letters were, indeed, MTI members and several of them indicated, along with their names, that they were an MTI member.

Q Did you communicate the results of this survey that you were taking to the Board of Education at any time prior to the time that you spoke on December 6th?

A Not to the Board of Education, no.

Q Well, the survey itself, you just got the results on December 6th. Is that right?

A The results of the survey? Are you talking about the ones that went to all teachers or the first letter?

Q Well, the first letter. What did you do with the results of the first letter?

A The first letter results were taken, of course, to that meeting, the December 2nd meeting.

Q Did you receive any financial assistance or assistance of [91] any kind from the Administration of the Madison Public Schools or the Madison School Board?

A None whatsoever.

Q How did you finance the entire thing?

A My wife's new coat.

* * *

Mr. Reed financed approximately one-third of it and five other teachers contributed money to it in small amounts.

* * *

Q Was the Board of Education or the Administration aware of the fact that you were, or intended to circulate a petition prior to December 2nd?

A That we intended to circulate a petition in all of the schools?

Q Yes.

A No, they were not.

Q Was MTI aware of the fact that you were going to circulate a petition?

A I would assume that with seven members present at the meeting, that they would have gotten some feedback, yes. It was no secret.

Q Did you receive any assistance at all in your project from the Administration or the Madison School Board?

A None whatsoever. We asked for the mailing list and that was not given.

Q So this entire grass roots reaction to fair share is yours and Mr. Reeds. Is that right?

* * *

Q This entire reaction to fair share was yours and Mr. Reeds. Is that it?

A Yes, initially. It grew.

Q You are suggesting initially that what you mean by growing [92] is other teacher involvement. Is that it?

A Well, the fact that we did receive a little over two hundred mail responses. The fact that four hundred and seventeen people wanted clarification, yah. I'd say the fact that we were able to get a representative in all of the schools except the one — from fifty schools from Thursday night to Sunday afternoon I think speaks of a grass roots movement.

* * *

CROSS-EXAMINATION OF MR. HOLMQUIST BY MR. KELLY:

Q As I understand, this was you and Mr. Reed's first approach to teachers in the Madison School District relative to fair share. Is that correct, sir?

A Outside of asking opinions of teachers at our own schools, yes.

Q But other than the faculty in your own schools, your first approach to teachers generally employed by Madison Public Schools was this letter?

A Generally, yes. I might say that I asked teachers who were neighbors and who were on committees that I serve on also.

Q And this letter was developed by you?

A Mr. Reed and myself.

Q Did you discuss this letter with anyone other than teachers prior to your sending it out?

A No, we did not.

Q Did you discuss it with any member of the Administration?

A No.

Q Did you discuss it with anyone in the Curriculum Department?

A No, sir.

Q Did you discuss it with Mr. Sapone?

A No, I did not.

Q And this was mailed and you say that you, individually, or Mr. Reed, paid the expenses?

A Yes, sir.

Q Who did the addressing of these?

A Myself, my wife, Mr. Reed and his wife.

Q Did you ever think that you ought to visit with the MTI about this problem?

A No, sir.

Q Did you send a copy of this specifically to the MTI?

A No, I did not.

[93] Q Now, as a result of the meeting on December 2nd, you came up with what has been marked as Employer's Exhibits No. 18, No. 19 and No. 20. Did you discuss Exhibit No. 18 with anyone other than teachers?

A No, I did not — my wife. My wife is a teacher.

Q Did you discuss it with any member of the Administration?

A No, I did not.

Q How about Exhibit No. 19, the points of information? Was that discussed with —

A (Interrupting) Some of the points on there were gleaned from position papers that were put out by both MTI and the Administration. I couldn't say for sure which ones were which at this time.

Q It says down here, "The enabling legislation, Senate bill 198A, is constitutional according to our legal advice." Did you seek legal advice?

A Correct. I spoke about the matter with two friends who are attorneys, yes. In a formal sense, no. We did not seek legal advice.

Q And here, again, the total cost was paid by you?

A That's correct.

Q You mentioned there were five other teachers. Were they members of MTI?

A I don't know for sure. I'd have to check.

MR. KOPS: (Interjecting) I guess I'm a bit confused. Are we talking about the meeting on Thursday?

WITNESS HOLMQUIST: The initial letter was funded entirely by myself. There were contributions later. It's a matter of when money comes in.

MR. KOPS: Bob, I'm confused about these five other teachers. There was a meeting where fourteen teachers were present.

MR. KELLY: As I understand your testimony, you testified that Mr. Reed paid about a third and you paid the balance of it and a small amount that five individual teachers contributed to the cost of mailing.

WITNESS HOLMQUIST: That's correct. From one individual we received two dollars in the mail. At the meeting itself, one teacher gave us one dollar and we received fifteen dollars from a group of three teachers at [94] one other school.

* * *

Q You spoke of receiving a letter from Mr. Waldman. That's Exhibit No. 21.

A Yes, sir.

Q Do you know John Waldman?

A No, I don't.

Q Do you know what capacity Mr. Waldman may have written this letter in?

A Mr. Waldman is the ex-President of MTI. Yes, I received much mail urging me to join MTI last year over his signature.

Q Did you interpret this letter as coming from Mr. Waldman as President of MTI?

A I interpreted that letter to come from Mr. Waldman. I believe that that is stated in the body of the letter.

Q This is his personal letter as John Waldman?

A That was our understanding of it, yes.

Q You didn't understand it to be an official letter of the MTI, did you?

A No, we understood it to be his own personal letter. We also were aware of the fact that he was on the Board of Directors of MTI and interpreted his letter in that light.

Q When you made your statement to the Board of Education, what was your purpose?

A My purpose was to attempt, since there was the confusion on the issue, to attempt to clarify just what all this was about — what fair share and agency shop was. I understand, legally, there is a difference between those two and when I would see in a publication it said fair share and in parenthesis it said agency shop — I felt that, in and of itself, was engendering confusion on the part of teachers and I wanted that straightened out.

Q It says point one here, as I understand you read to the Board. "We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups." Did you want the Board to do that, sir?

A This was the feeling of the group of fourteen people who met on Tuesday evening.

Q And your purpose as their spokesman was to encourage the [95] Board to do that very thing. Is that right, sir?

A That's correct. That's the way it reads.

Q And when it says here that "We propose ... the findings of this study be made public." It was your desire that the Board do that?

A Yes. The desire of the group was that all negotiation be public.

Q At this point, your purpose was to ask the Board in this specific request to make a study of fair share concept a matter of public knowledge?

A We asked the Board and Madison Teachers, Incorporated to do that.

Q Number three, "This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal." Was it your intent that the Board adopt that and do that — recommend that change?

A The intent of the group was that the Board, with Madison Teachers, Incorporated, work this out. Not that this be done by the Board itself or by Madison Teachers itself but somehow as a group be worked out together.

Q But your purpose was that an impartial committee of some selection ballot the teachers? That was your desire. You wanted the Board to do that?

A Yah, I would have like to have seen that written into 198A.

Q And it was also your desire that the results of this written ballot be made public. Is that right?

A That's correct.

Q In other words, it was your specific purpose in addressing the Board that they not adopt Madison Teachers' fair share proposal at that time?

A No. We wished that the information be given to all teachers regarding agency shop, fair share proposal.

Q There was a proposal before the Board at that time, before their negotiating committee, on fair share, was there not?

A Yes. We asked that it be deferred this year.

Q So it was your purpose that the Board not pass that — not agree to accept that fair share proposal at this time.

A We, and I'm speaking of the group, would have been amenable if the poll could have been conducted before the new contract [96] would have taken effect.

Q All right. This was December 6th. On December 6th your purpose in addressing the Board was to defer or delay any action on fair share at that time. Is that correct?

A My purpose was to end the confusion by deferral, yes.

Q Did you want the Board to defer action at that time? Was that your purpose?

A I wanted the Board and MTI to get it straight by referral. I think it's very clear. By "deferral" I should have said.

Q But you never, before December 6th, came to the officials of MTI and asked for that position?

A In what capacity?

Q Well, did you contact your Executive Secretary? Secretary?

A No, I didn't.

Q Did you contact your President?

A No, I did not.

Q Did you contact the Chairman of your negotiating committee?

A No, I did not.

Q Did you contact any member of your negotiations committee?

No, I did not but they also received the first letter and they had also seen the petition prior to the meeting of the School Board.

* * *

Mr. Holmquist, are you aware the Statute permits a vote on fair share agreements?

WITNESS HOLMQUIST: It's my understanding that the statute permits a vote after adoption at the negotiating table. That assumes that it has been negotiated and accepted by both sides. Now, if you're talking about a vote after the first fact, that's a different thing.

CHAIRMAN SLAVNEY: Are you aware that there's a provision in the Statute and that provision in the Statute relating to the fact that if a majority of the employes in the bargaining unit do not favor the fair share agreement, that it would be terminated?

[97] WITNESS HOLMQUIST: Yes, I'm aware of that. That is, after it's adoption of course.

* * *

Q Are you aware of the fact that any agreement accepted by the negotiation team of MTI would be presented to the teachers for ratification?

A Yes, I'm aware of that.

* * *

MR. KELLY: Yes, that was my question.

WITNESS HOLMQUIST: It was my understanding that the agreed upon — the negotiated agreement by MTI and the Board is presented to MTI members. I have never been presented with the opportunity to vote on a contract.

* * *

[98] Q You say on the evening of your — of the meeting of the School Board, you went there at 6:00 o'clock and you went to the Curriculum Office. Is that right, sir?

A I went to the auditorium.

Q Well, after you went to the auditorium, you did at some time go to the Curriculum Office?

A Yes, sir. I did.

Q Do you have to have a key to get in there?

A I didn't that evening.

Q Was it open?

A I asked to be let in.

Q Who did you ask to let you in?

A The custodian.

Q You asked a custodian to let you in?

A That's correct, the first time I entered.

Q The first time you entered where, sir?

A The Curriculum Department.

Q You asked the custodian to let you in?

A That's right.

Q And what did you tell the custodian?

A That I'd like to get in to use the telephone, please.

Q Had you pre-arranged that with Mr. Reed that he would meet you inside the building in the Curriculum Office?

A I arranged with Mr. Reed to meet in the hallway.

Q Outside of the Administrative offices?

A Outside of the offices, in the hallway.

Q Did those offices allow incoming calls after 6:00 o'clock?

A The switchboard, I believe, closes down at 4:30.

Q How would you get incoming calls or were you calling your wives?

A I was calling out.

Q Had you made any pre-arrangement with anybody in Administration to use those offices?

[99] A None whatsoever.

Q You had asked no permission?

A No. I just thought I'd save a dime.

Q You say you and Mr. Reed are taking a class together? Is that correct?

A We were last semester.

Q What class was that?

A It's called The Politics of Education.

Q What does it lead to? Does it lead to a degree?

A It's a course in the Department of Educational Administration. It's an optional course for a degree. It's a degree in Educational Administration.

Q No further questions.

REDIRECT EXAMINATION OF MR. HOLMQUIST BY MR. KOPS:

Q Mr. Holmquist, Mr. Kelly, through some of his questions indicated that somehow the direction of your remarks was limited to the Board of Education. Were, indeed, was it your intent to limit your remarks or limit the results of the survey to the Board of Education?

A It was not my intent nor was it my action.

Q What was your intent concerning the nature of this survey?

A That it be cleared up — the confusion.

Q To whom were your remarks directed?

A The spoken remarks?

Q Yes, and the petitions?

A The petition was, as it reads on the top, directed to the Madison Board of Education and Madison Teachers, Incorporated.

Q All right. Now, you spoke of remarks. To whom were those directed?

A Those were directed to the Board. It was, after all, the Board Meeting. The MTI representatives were present and did hear them as they have stated.

Q And, in fact, you communicated the nature of your remarks prior to the meeting to the members of MTI. Is that correct?

A That's correct.

Q And along with the results of the survey?

A That's right. That's correct. My other intent was that the public know that there was confusion.

Q Okay. After the meeting and after you spoke, Mr. Holmquist, did you have any contact with members of the Administration?

[100] A I had none, outside of saying hello and friendly sort of talking.

Q Did you have any contact with MTI after the meeting?

A I spoke to Mr. Du Vair and expressed by regret that I had been unable to sign the petition that he presented to the Board.

Q And as you were leaving, did anything else occur?

A Yes. I was grabbed by the coat collar by someone I presume to be a teacher but I'm not certain, and was picked up slightly off my feet and told in a gruff voice, "We'll get you."

Q Now, after that was there any contact between MTI and yourself?

A There has been none outside of a letter urging me to join their organization.

Q When did you receive that letter?

A Mid-January, I believe.

Q The information that you collected as a result of this meeting on December 2nd which resulted in your petition on December 6th, the information was initially given to MTI, then, through Mr. Matthews. Is that right?

A The evening of the December 6th meeting, yes.

Q Did you ever, other than speaking, give the Board members the results of your survey in writing?

A No, sir.

Q Or other members of the Administration?

A No.

Q Nothing further.

RECROSS-EXAMINATION OF MR. HOLMQUIST BY MR. KELLY:

Q Mr. Holmquist, did you think that the meeting on December 6th was a joint meeting between MTI and the Board?

A No, I did not.

Q Did you know that members of MTI would be there?

A Yes. It was rather well advertised in the paper and in the schools.

Q You say that someone grabbed you in a violent fashion. You don't know who that was?

A No.

Q You don't know whether it was a member of MTI?

A No. It could have been anyone, as I stated before.

Q No further questions.

[101] Q Okay.

CHAIRMAN SLAVNEY: You're dismissed.

(The Witness is dismissed.)

* * *

MR. KOPS: I'll call Ralph Reed.

MR. RALPH K. REED having been called as a Witness by Counsel for the Respondent and having been duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION
OF MR. RALPH K. REED
BY MR. KOPS:

Q Would you state your name for the record?

A Ralph K. Reed.

Q By whom are you employed?

A Madison Public Schools

Q Are you a teacher for the public schools?

A Yes, I am.

Q Are you a member of Madison Teachers, Incorporated?

A No, I am not.

Q Are you a member of any labor organization which has membership among teachers employed by Madison Public Schools?

A No.

Q You are a friend of Al Holmquist?

A Yes.

Q And you were the other individual who collaborated with Mr. Holmquist concerning the development of the survey which took place on December 6th, 1971?

[102] A Yes, among others.

Q Mr. Reed, Mr. Holmquist testified that there was some dissatisfaction with regard to — or confusion regarding exactly what fair share meant, and was that the initiating force for your getting involved in this?

A I would say yes because we were confused personally.

Q And did you approach your MTI representative at your school concerning what fair share meant?

A Yes, I did.

Q And what response, if any, did you receive from him?

A He did not know either.

Q Did he indicate to you that he would get the information for you?

A Yes.

Q Did he?

A Yes, he did come back saying it was full unified dues.

Q And is that when you and Mr. Holmquist decided to take some individual concerted action?

A Yes.

Q Now, other than your contact with your MTI representative in your school, did you have any contact with other members of MTI?

A From what point?

Q Well, after you received the notification that fair share really meant unified dues, did you contact MTI at all?

A No, except through my local representative.

Q Okay, did you receive any satisfaction from your local representative?

A Not exactly, due to the fact that he was not in complete agreement with the MTI position on fair share either.

Q Who was your representative?

A Roger Wiebe.

* * *

[103] CHAIRMAN SLAVNEY: I'll let him answer.

* * *

Q What was the position of Mr. Wiebe?

A He was not sure that fair share should also mean one hundred percent. As to the percentage, neither one of us could say what would be a fair share.

Q Now, did you participate in the development of the letter that was sent to all teachers?

A Yes, I did.

Q And you also participated in the meeting that was held for December 2nd?

A Yes, I did.

Q And the development of the petition?

A Yes, I did.

Q And you paid some of the expenses for this?

A Yes, I did.

Q Now, did you also — were you present at the meeting on December 6th?

A Yes, I was.

Q And did you, at any time during these conferences prior to the meeting with Mr. Matthews, Mr. Mason and Mr. du Vair, communicate or give them the petition that you were circulating in the schools?

A No, I did not personally.

Q Well, did you see them have a copy of the petition?

A Yes, I did.

Q When was that?

A Prior to the meeting I personally saw Al Holmquist place a copy of the petition on Mr. du Vair's books.

Q Mr. du Vair's or Mr. Matthews?

A Excuse me, Mr. Matthews' books. My fault. I also personally saw Mr. Matthews pick it up and look at it and it had the number written on there at the top as to how many responses we had received.

Q Now, during one of the discussions in the Curriculum Office, specifically the discussion where Mr. Matthews was present and Mr. du Vair was present and Mr. Mason was present, was there an appeal on the part of these people that you not present the results of your informational survey to the Board of Education?

[104] A Yes, there was.

Q And were any promises made to you concerning if, in fact, you would not present that information?

A I would say no, there were no promises made.

Q Well, what feelings, if any, did you gain from this appeal that you not present the information?

A They stated a willingness to possibly show us the newly arrived at agreement between the Board of Education and MTI if we would consider not going before the Board of Education with our results.

Q Did they express and insist at that point in seeing the results of your survey?

A Yes, they did and we said we would give them a copy of the results whenever we had them ourselves since we were still in the process of obtaining them from our wives.

Q Now, did you receive any assistance from the Administration of the public schools in this matter?

A No, I did not and I did not request any.

Q Did you attempt to contact, personally, any members of the Board of Education concerning this matter?

A No, I did not.

Q Or members of the Administration concerning this matter?

A No, I did not concern them other than to tell my local Principal what I was doing and asked his permission to present this petition in our school.

Q Now, that was December 6th, is that it?

A Correct. I had also shown him our earlier letter as it had been mailed out so he would be knowledgeable of what I was doing as a teacher in his school.

Q Now, to whom was this survey directed or the results of this informational survey directed?

A To the Board of Education and the Madison Teachers, Incorporated.

Q And what was the rationale for becoming involved in this issue which ultimately resulted in the circulation of the petition and the speech by Mr. Holmquist?

A A clarification of the issue as we saw it. In other words, we did not feel as though we clearly understood the issue and felt as though, from conversations with other teachers, that many others did not know the real issue or what the issue really was. So, we were asking only that we have [105] information available to all teachers that would clarify this issue for everyone.

* * *

CROSS-EXAMINATION OF MR. RALPH K. REED BY MR. KELLY:

Q You spoke of this petition which I think is Employer's Exhibit No. 18. The petition given to Mr. Matthews or the petition you saw given to Mr. Matthews had no names on it?

A No, it did not.

Q Where did the number appear on it? Do you know?

A On the top.

Q What did it say?

A N=417.

Q N=417 is all that was on there?

A Yes, assuming that "N" means Number.

Q You say that the officers of MTI had appealed to you not to present any information you had to the Board of Education? Did they tell you why?

A They felt it would be damaging to their position.

Q Did you ever use the school mailboxes?

A In my local school, I did, to give the informational letter to the teachers in my school.

Q And did you ask permission from your Principal?

A Yes, I did.

Q And did he give you permission to do that?

A Yes, he did.

Q And he also gave you permission to circulate this petition in the school? Is that right?

A On my time, yes. I should say on my "non-teaching time."

Q Did you ask, specifically, what area you could do it in?

A No, I did not.

Q Where did you circulate it?

A The teachers' lounge and in individual teacher's rooms when the teachers were not in a class in my school.

Q And your Principal did give you permission to circulate this?

A Yes.

Q Did you show them the petition and let them read it?

A Yes, I did.

Q Did you use the teachers' mailboxes to distribute what has [106] been marked as Exhibit No. 10?

A No, I did not.

Q What did you use the teachers' mailboxes to distribute?

A I sent out a point of information letter by myself that was an off-take from the one which we presented to all of the teachers in the forty-nine schools.

Q I show you what's been marked as Employer's Exhibit No. 19. It's different from this. Is that right?

A It is slightly different but it is very basically the same. It has similar content.

Q Have you got a copy of that?

A Yes, I do.

Q Could we see it, please?

A Yes.

* * *

Mr. Reed, I show you what's been marked as Union Exhibit No. 22 and ask you if you can identify that.

A Yes. I typed it and I signed it.

Q Its purports to be a letter addressed to "Dear fellow Van Hise Teachers" and it's signed by you. Is that correct?

A That's correct.

Q And this letter you took to your Principal and asked his permission to circulate it in the teachers' mailboxes?

A Yes, I did.

Q Did you circulate it anyplace else?

A Yes, I did.

Q Where did you circulate it?

A At Van Hise Elementary also.

Q And how did you circulate it there?

A By the same method. I asked the Principal if I could put it in the teachers' mailboxes.

Q And you did, in fact, put it in the teachers' mailboxes?

A And I gave her a copy also.

Q The Principal?

[107] A Yah.

Q And the Principal at that school is who?

A Dr. Schnicke.

Q And Dr. Schnicke approved of you doing it, sir?

A Whether or not she approved, she gave me permission.

Q Did you circulate this letter yourself?

A No, I did not.

* * *

(Document previously marked for identification as Union Exhibit No. 22 was received in evidence.)

MR. KELLY: I have no further questions.

REDIRECT EXAMINATION OF
MR. REED BY MR. KOPS:

Q Mr. Reed, did you hear from any member of MTI concerning whether or not there was unanimous agreement between members of the Board of Directors for the inclusion of the fair share proposal?

A Yes, I did.

Q Who did you hear it from?

A Mr. Roy Fortune.

Q Who is Mr. Fortune?

A I believe he is the Middle School Representative on the Professional Negotiating Committee.

Q And what, if anything, did he say concerning the nature of the Board of Directors concerning agreement for putting fair share in the proposal?

A He reported that after considerable disagreement it passed on a five to four vote.

Q Was this among the Board of Directors?

A Yes, that's what he said.

Q Did he indicate who voted?

A No, he did not, other than to indicate that he was against it.

Q Did anybody else indicate to you during this that they were against the inclusion of fair share in the proposal?

A Not directly.

Q Did anybody indirectly indicate?

A Indirectly it was mentioned of others that may have been against it but it was not anything official.

Q When did you place this communication in the mailbox?

A The morning of December 6th.

[108] Q When was this? Was it before school started?

A Yes, it was.

* * *

MR. KOPS: I'll call Dr. McGrew.

DR. JEAN B. McGREW having been called as a Witness by Counsel for the Respondent and having been duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION OF
DR. JEAN B. McGREW
BY MR. KOPS:

Q Would you please state your name?

A Jean McGrew.

Q By whom are you employed?

A Madison Public Schools.

Q In what capacity?

A I'm Assistant Superintendent of Schools.

Q And on the morning of December 6th did the Principals at any of your two schools that were mentioned

here call the Administration to find out whether or not a letter could be circulated by Mr. Reed, if you know?

A No, not to my knowledge. At least they didn't call my office.

Q Nothing further.

MR. KELLY: Nothing.

CHAIRMAN SLAVNEY: You're dismissed.

(The Witness is dismissed.)

* * *

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

[Caption omitted in printing]

DECISION

Appearances:

Madison City Attorney, by *Mr. Gerald Kops*, Assistant City Attorney, appearing on behalf of the Respondents.

Mr. Robert C. Kelly, Attorney at Law, appearing on behalf of the Complainant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Madison Teachers, Inc. having on January 6, 1972, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that Joint School District No. 8, City of Madison, et al, and the Board of Education of said school district had committed certain prohibited practices within the meaning of the Municipal

Employment Relations Act; and hearing in the matter having been conducted on February 28, 1972 at Madison, Wisconsin by the Wisconsin Employment Relations Commission, Chairman Morris Slavney and Commissioner Zel S. Rice II being present; and the Commission, having reviewed the evidence and briefs of Counsel as well as briefs amicae filed by the Wisconsin Education Association, and the National Right To Work Legal Defense Foundation, being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Complainant, Madison Teachers, Inc., hereinafter referred to as MTI, is a labor organization, having its principal office at 121 South Hancock Street, Madison, Wisconsin.

2. That the Respondent Joint School District No. 8, City of Madison, Villages of Maple Bluff, and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg, and Burke, hereinafter referred to as the District, operates a school system in said city, villages and towns, and has its principal office at 545 West Dayton Street, Madison, Wisconsin; and that Respondent Board of Education of the District, hereinafter referred to as the Board, is an agent of the District and is charged with the possession, care, control and management of the property and the affairs of the District.

3. That MTI is the majority collective bargaining representative for all regular full-time and regular part-time certificated teaching personnel employed by the District, including psychologists, psychometrists, social

workers, attendants and visitation workers, work experience coordinator, remedial reading, University Hospital teacher, trainable group, librarians, guidance counselors, teaching assistant principals (except at Sunnyside School), teachers on leave of absence, but excluding on-call substitute teachers, interns and all other employes, principals, supervisors and administrators, having been certified as such by the Wisconsin Employment Relations Commission on June 7, 1966.

4. That since 1966, MTI and the Board have, as a result of conferences and negotiations, entered into a series of collective bargaining agreements covering the wages, hours and conditions of employment of the aforementioned bargaining unit personnel, the last of such written agreements had for its term the period commencing January 1, 1971 and ending December 31, 1971; that said agreement included among it provisions the following in Article II:

"A. CONFERENCE AND NEGOTIATION

. . .

c. Each party to this Agreement desiring to be represented by agents for negotiating agrees to furnish to the other party a list of its duly authorized agents for such purposes. Each party agrees to negotiate only with said agent and no others, including their principals, namely, the Board of Education or Madison Teachers, as the case may be, unless the latter as principals authorize negotiations with others or themselves.

d. If matters which are proper subjects of negotiations are brought, whether in the form of a grievance, petition or otherwise, to the

attention of either of the parties to this Agreement by any individual, group of individuals or organization other than the other party to this Agreement or its duly authorized agents such latter party shall be punctually informed of such action."

5. That by letter dated January 25, 1971, MTI gave the Board timely notice of its desire to modify the existing written agreement as of the end of its term; that MTI accompanied such notice with its written proposal of modifications, deletions and additions to be made in such existing agreement for the 1972 agreement; that included in such proposal was a proposal that the 1972 agreement, covering the 1972 calendar year, contain a fair share agreement.

6. That conferences and negotiations between the parties for a successor agreement covering the calendar year 1972 continued until October 4, 1971; that the fair share proposal was a subject of such conferences and negotiations during this entire period of time; that the Board objected to incorporating the proposed fair share agreement into the 1972 agreement, for one of the reasons that fair share agreements were not permitted under the law, specifically under Section 111.70 of the Wisconsin Statutes as then promulgated; that on October 4, 1971, MTI submitted a revised fair share proposal to the Board in negotiations, wherein the MTI proposed that the parties agreed to incorporate a fair share agreement into the 1972 agreement, but that such fair share agreement would not become effective until such provisions were specifically permitted by enabling legislation; and that the fair share agreement proposal continued to be a subject under discussion at the bargaining table.

7. That Chapter 124, Laws of 1971, as adopted by the Legislature was published on November 10, 1971, becoming effective by virtue of Section 990.05, Wis. Stats. on November 11, 1971; that Chapter 124, Laws of 1971, among other things amended Section 111.70(2), Wis. Stats. so as to permit municipal employers and the majority representative of its employes to enter into a fair share agreement as defined by Section 111.70 (1) (h) of the Statutes; that thereafter, on November 17, 1971, MTI submitted to the Board in negotiations, a third fair share proposal, which proposal complied with the provisions of Municipal Employment Relations Act established by Chapter 124, Laws of 1971, relative to fair share agreements.

8. That by November, 1971 the number of unresolved issues between the parties was reduced to approximately thirteen, including issues with respect to MTI's proposals of binding arbitration of nonrenewal of teacher contracts and teacher dismissals, as well as the fair share agreement; that the Board had stood fully opposed to providing for binding arbitration of teacher nonrenewals and teacher dismissals during the entire period of negotiations first commencing on January 25, 1971; that, likewise, the Board had consistently taken a position against MTI's fair share proposal; that however, at one time in the latter part of October, or early part of November, Paul Olson, Chief Negotiator for the Board, during a meeting Chief Negotiator for MTI, indicated that he could see no way in which the Board would grant binding arbitration of teacher nonrenewal and dismissal, but that there was a distinct possibility that the Board would grant fair share; and that Olson had also indicated to MTI that there were two members of the Board who would grant the fair share proposal if MTI would drop its

demand for binding arbitration of teacher nonrenewal and dismissal.

9. That in November, 1971 Ralph K. Reed and Albert Holmquist, teachers employed by the District, neither of whom are members of MTI, drafted a document, made a part hereof as Appendix "A", and mailed same on November 14, 1971 to all teachers in the employ of the District.

10. That Reed and Holmquist received approximately two hundred replies to such letter, the majority of which were favorable to their position on fair share; that thereafter Reed and Holmquist called a meeting of those teachers who had indicated they would work actively against any fair share agreement; that such meeting was held on Thursday, December 2, 1971, and was attended by fourteen teachers, seven of whom were MTI members and seven of whom were not; that as a result of said meeting additional three documents, made a part hereof as Appendix "B", "C", and "D", were prepared and printed and hand delivered or mailed to certain teachers, who distributed said documents to other teachers during their free periods in the various schools between December 2nd and 6th, 1971.

11. That on December 6, 1971 Reed, upon his request, was given permission by the Principals of Van Hise Elementary and Junior High Schools to circulate the "petition" among teachers in said schools on Reed's free time, as well as permission to use the teachers' school mailboxes for the distribution of a letter, made a part hereof as Appendix "E".

12. That a regular meeting of the Board was held during the evening of December 6, 1971; that among others present at said meeting, were officers and representatives of MTI, as well as three to four hundred teachers, who were members of MTI; that Reed and Holmquist were also present; that during a portion of said meeting, described in the meeting agenda as "Public Appearances", the president of MTI, Paul Du Vair, addressed the Board, urging the Board to resume negotiations with MTI and to reach an agreement on the provisions of the 1972 collective bargaining agreement; that upon the conclusion of his remarks, Du Vair presented to the Board a statement, containing the signatures of between thirteen and fourteen hundred teachers, setting forth that "We the undersigned wish the parties to resume negotiations and reach agreement as quickly as possible"; that Holmquist was also permitted to speak to the Board; that Holmquist prefaced his remarks to the Board by stating:

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package.";

that Holmquist then read to the Board the text of the Petition he had circulated among the teachers dated December 6, 1971; that in so doing he stated as follows:

> "To: Madison Board of Education, Madison Teachers Incorporated. We the undersigned ask that the fair-share proposal (agency shop) being negotiated by

> Madison Teachers Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair share proposal. 4) The results of this written ballot be made public."
>
> "We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the 'whole package' and therefore is not issue specific ... Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it. For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more i importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation."

13. That at the conclusion of Holmquist's remarks, Mrs. Doyle, President of the Board, asked Holmquist, "Do you intend to communicate these petitions to the Board when you have them all."; that Holmquist replied in the affirmative; and that no other Board member spoke to Holmquist on the matter; that immediately after its regular public meeting the Board went into executive

session, during which the unresolved issues, including arbitration of teacher nonrenewal and dismissal and fair share were discussed by the Board; that as a result of such discussion a resolution was adopted by the Board as follows:

> "It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and *not* including agency shop; if the MTI does not accept this as a total package the offer of arbitration is withdrawn".

14. That on December 7, 1971, authorized representatives of MTI met with authorized representatives of the Board in a previously scheduled negotiations meeting; that Dr. Ritchie, Superintendent of Schools, and an agent of the District, at the opening of such negotiation meeting, gave the representatives of MTI a copy of the above resolution, informing such representatives that such resolution stated the Board's position, indeed "that this was the deal"; that discussions concerning the Board's position and fair share took place during such meeting; that the Board's representatives remained adamant in their position and in the afternoon of that day the parties reached tentative agreement upon MTI accepting the Board's position and that such tentative agreement was accepted as the Agreement by both parties on December 14, 1971.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

That Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al, in permitting teacher Albert Holmquist to appear and speak at a meeting of the Board on December 6, 1971, as a representative of a minority of the teachers in its employ, on the matter of the fair share agreement, a matter subject to negotiations between said Municipal Employer and Madison Teachers, Inc., the majority bargaining representative of certificated teaching personnel in the employ of said Municipal Employer, violated its duty to bargain in good faith with Madison Teachers Inc., and Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al, thereby interfered with the rights of employes represented by Madison Teachers Inc. to bargain collectively with representatives of their own choosing, and further thereby Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al, committed prohibited practices within the meaning of Sections 111.70 (3) (a) 4 and 1 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes the following

ORDER

IT IS ORDERED that Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al,

1. Shall immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc.

2. Take the following affirmative action which will effectuate the policies of the Municipal Employment Relations Act;

(a) Officially incorporate the instant Findings of Fact, Conclusions of Law and Order in the minutes of the Board of Education.

(b) Immediately notify Madison Teachers Inc. that they will not permit any employe in the bargaining unit represented by Madison Teachers Inc., other than a representative of Madison Teachers Inc., to appear and speak on matters subject to collective bargaining between them and Madison Teachers Inc.

(c) Notify the Wisconsin Employment Relations Commission within thirty (30) days of the receipt of a copy of this Order as to what steps they have taken to comply herewith.

Given under our hands and seal at the
City of Madison, Wisconsin, this 13th day of September, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Morris Slavney /s/*
Morris Slavney, Chairman

Zel S. Rice II /s/
Zel S. Rice II, Commissioner

Jos. B. Kerkman /s/
Jos. B. Kerkman, Commissioner

APPENDIX "A"

"Dear Fellow Madisonian Educator,

E. C. — O. L. O. G. Y.

*E*ducator's *C*hoice — *O*bligatory *L*eadership *O*r *G*rievance by *Y*ou

SAVE FREEDOM OF CHOICE

A Closed Shop (agency shop) Removes This Freedom

1. Does an organization which represents the best interests of teachers and pupils NEED mandatory membership deductions?
2. Need relationships between administrators and teachers be further strained by LEGALLY providing for mandatory adversary camps?
3. Should minority voices be mandatorily SILENCED?
4. Could elimination of outside dissent produce NON-RESPONSIVENESS to change?
5. And ...

isn't this lack of FREEDOM OF CHOICE undemocratic?

SUPPORT FREEDOM OF CHOICE —
OPPOSE AGENCY SHOP

I wish to maintain freedom of choice:

I oppose agency shop on principle _____

I oppose agency shop and would sign a petition stating so _____

I oppose agency shop and would work actively to maintain freedom of choice _____

Let us hear from YOU.

Al Holmquist /s/
Al Holmquist
Ralph Reed /s/
Ralph Reed
Teacher co-chairmen"

E.C.-O.L.O.G.Y.
P.O. Box 5184
Madison, WI 53705

APPENDIX "B"

"Dear Colleague,

1) The enclosed petition was drawn up Thursday night by a group of teachers.

2) Accompanying it is a letter of current, pertitant information. It may be used as a source for your own personal reference, posted on bulletin boards or even dittoed for mailbox stuffing (which is allowable). Please add information you may have to make it as specific to your situation as possible. (as below)

3) The following people in your school:

have written they would also work actively

have written they would sign the petition

have written they are opposed to the concept of agency shop on principle

Thirty-five others mailed in unsigned responses but indicated that they would sign the petition.

4) It is imperative to work quickly. We would like to present a first-day's total to MTI and the Board of Education this MONDAY night, Dec. 6. (It is the night of the last board meeting under our present contract)

Please call in 1) the number of signers
2) the percentage of your faculty contacted the first day

_____between 5 and 7 p.m.

5) When you have contacted everyone in your school affected by the contract please return the petition to Concerned Educators, Box 5184, Madison, WI 53705.

Who will sign for certain?

Who will sign after others do?

Which others?

Who might sign if you ask them first but might not sign later?

Who won't sign? (Don't be sure. Half of the people who wrote the petition are MTI members. Many MTI'ers responded to the original letter. And this point *was* included in the negotiation package

by a close vote of the board of directors)

Would a closed system be as responsive? to individual members

Isn't a loyal opposition necessary?

Freedom of Choice?

Ability to influence an organization by withholding of dues?

Thank you for your efforts and your support.

The Committee"

APPENDIX "C"

"POINTS OF INFORMATION

1. FAIR-SHARE, agency shop, and union shop need not be the same thing

   fair-share — the bargaining unit collects that *portion* of dues that goes *directly* toward negotiation and contract administration costs

   agency shop — the bargaining unit collects uniform dues and fees from members and non-members as a condition of employment

   union shop — you have thirty days to join the union or you have no job.

2. However, the current fair-share agreement proposal, in its language, EQUATES fair-share agreement and agency shop by definition.

'It is understood and agreed by and between the parties hereto that the employer will deduct from the monthly earning of the employees in the collective bargaining unit a fair share, SUCH AMOUNT BEING the monthly dues certified by Madison Teachers as the current dues UNIFORMLY REQUIRED OF ALL MEMBERS.'

3. This proposal, as is, was included as a point for negotiation by a close vote of the MTI board of directors.

4. MTI has refused to poll its membership on this perhaps critical individual point of negotiation.

5. It is true that legally, one need not join MTI under the fair share proposal.

6. However, even with a real fair-share agreement (as well as with the present proposal) everyone covered by the contract *must* become a MEMBER OF WEA and NEA. Right now part-time teachers who pay partial MTI dues *must* pay full NEA and WEA dues as full members.

7. For even a real fair-share proposal to take effect it must have the support of the majority of all affected by the contract.

8. The enabling legislation, Senate bill 198A, is constitutional according to our legal advice.

9. The petition is not to be construed as anti-MTI. All that is asked is that the present fair-share proposal be deferred this year until adequate study and dissemination of information — and *your* opinion is known.

for communication, not confrontation"

APPENDIX "D"

"To: Madison Board of Education

Madison Teachers, Incorporated

We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers, Incorporated and the Madison Board of Education be deferred this year. We propose the following:

1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups.

2) The findings of this study be made public.

3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal.

4) The results of this written ballot be made public.

_____ _____

_____ _____

_____ _____

_____ _____"

APPENDIX "E"

"Dear fellow Van Hise Teachers, Dec. 6, 1971

In the next few days you will be asked to sign a petition asking that the FAIR SHARE (AGENCY SHOP) proposal being negotiated between M.T.I. and the Board of Education be deferred until the topic has been studied,

information from the study has been disseminated to all concerned, and all teachers have been balloted as to their position on this important issue.

Please consider the following informational points:

1. FAIR-SHARE, agency shop, and union shop need not be the same thing.

   Fair-share: The bargaining unit collects that *portion* of dues that goes *directly* toward negotiation and contract administration costs.

   Agency shop: The bargaining unit collects uniform dues and fees from members and non-members as a condition of employment.

   Union shop: All employees have thirty days to join the union or they loose their job.

2. The current fair-share proposal, in its language, EQUATES fair-share agreement and agency shop by definition.

   'It is understood and agreed by and between the parties hereto that the employer will deduct from the monthly earning of the employees in the collective bargaining unit a fair share, SUCH AMOUNT BEING the monthly dues certified by Madison Teachers Incorporated, as the CURRENT DUES UNIFORMLY REQUIRED OF ALL MEMBERS.' (emphasis mine)

3. This proposal was included as a point for negotiation by a very close vote of the MTI board of directors.

4. MTI has refused to poll its membership in this perhaps critical individual point of negotiation.

5. Legally, it is true that one need not join MTI under the fair share proposal.

6. However, even with a 'real' fair-share agreement (as well as with the present proposal) everyone covered by the contract *must* become a MEMBER of WEA and NEA. Presently, part-time teachers who pay partial MTI dues MUST pay FULL NEA and WEA dues as full members.

7. For any fair-share proposal to take effect it must have the support of a majority of all affected by the contract.

8. The enabling legislation, Senate bill 198A, is constitutional according to our legal advice.

9. The petition being presented is NOT to be construed as anti-MTI. All that is asked is that the present fair-share proposal be deferred this year until adequate study and dissemination of information — and *your* opinion is known.

For communiciation, not confrontation,

Ralph K. Reed /s/
Ralph Reed
Rm. 111"

See me if you have
additional questions not
covered above.

JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE, AND THE BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT NO. 8, et al, VIII, Decision No. 11271

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Pleadings

In its complaint MTI alleged that, by permitting Holmquist, as an individual employe and as the representative of seventy-two other employes, to attempt to influence the School Board, hereinafter referred to as the Board, on behalf of the District, in its decision regarding the issue on the fair-share agreement as proposed by the MTI during bargaining, the District negotiated with an individual employe or a group of employes, and that thereby the Board interfered with and restrained bargaining unit employes in their right to bargain collectively through representatives of their own choosing in violation of Sec. 111.70 (3) (a) 1 of the Municipal Employment Relations Act, hereinafter referred to as MERA, and further, that the Board thereby failed and refused to bargain collectively with MTI in violation of Sec. 111.70 (3) (a) 4 of MERA. MTI would have the Commission order the Board to cease and desist from such activity "now and in the future", and further requests the Commission to order that the Board expunge from its official minutes "any and all reference to the remarks" made by Holmquist at the December 6, 1971 meeting of the Board, and further that the Board expunge from its

minutes and records "any reference to any written petitions, including such written petitions themselves" received by the Board from Holmquist on December 6, 1971.

In its answer the District contended that Holmquist's remarks made at the Board meeting of December 6, 1971 "involved solely the giving of a position statement at an ordinary meeting of a public body and thus cannot be labeled as negotiating", that Holmquist was not questioned by the Board, and that the Board refrained from any discussion or conversation with Holmquist during and after his statement. The District denied the commission of any prohibited practices and requested that the complaint be dismissed.

The Facts

All the facts dispositive of the issues involved herein are set forth in detail in the Findings of Fact.

The Positions of the Parties

As indicated in the preface of the Commission's decision both the MTI and the District filed briefs./[1] Upon permission from the Commission, briefs amicus were filed by the Wisconsin Education Association and the National Right to Work Legal Defense Foundation. The Commission appreciates the thoroughness and quality of said briefs, and in that regard commends those who prepared same./[2]

/[1]MTI also filed a reply brief.

/[2]A review of the record, which refreshes a recollection of the hearing, warrants complimenting Attorney Kelly and Attorney Kops for their attitude, conduct and competency in making the record in the instant matter.

The Position of MTI

MTI sets forth two basic arguments in support of its complaint that the District committed the prohibited practices as alleged in the complaint filed herein. It contends that:

1. "In permitting a representative of a minority of its bargaining unit employes to appear at a public meeting of the Board and to speak to the Board on fair share, a mandatory subject of bargaining, the Board failed and refused to collectively bargain with MTI as the representative of a majority of its employes in violation of Section 111.70 (3) (a) 4, Wis. Stats., and interfered with the right of said bargaining unit employes to collectively bargain through MTI as the representative of their own choosing in violation of Section 111.70 (3) (a) 1, Wis. Stats."

2. "A Municipal Employer cannot base its decision to reject a fair share proposal on a poll of its bargaining unit employes."

In support of its first contention MTI argues that the Board was bound to "deal exclusively" with it as the exclusive representative of its teachers, and that therefore a minority union,/[3] or a minority group of employes,/[4] cannot negotiate with the Board and likewise the Board is prohibited from negotiating either with a minority union or a minority group of employes, and if it does so, the Board violates its duty to bargain with the exclusive bargaining representative.

In said regard MTI argues:

> "Holmquist as the representative of a minority of teachers was permitted to discuss with the Board, i.e. to

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/[3]*Milwaukee Board of School Directors v. WERC*, 42 Wis 2d 637 (1968).

/[4]*M & M Chevrolet Co.* (4083-A) 4/56.

convey to the Board the minority's ideas and thoughts on a mandatory subject of bargaining, and to possibly influence the decision of the Board as concerns such subject. Whether a two-sided conversation took place or not is immaterial. Holmquist as a minority representative was permitted to influence the Board in its decision making role and on a question of conditions of employment. Whether the remarks made by Holmquist did in fact influence the Board in its decision making process is also immaterial. His remarks could have had that affect. Indeed a strong inference arises from the facts in this matter that his remarks did so influence the Board in its bargaining position.

Immediately after the public meeting during which such remarks were made, the Board went into executive session. During such session it discussed the unresolved issues of fair share, the issue discussed previously by Holmquist, and arbitration of teacher nonrenewals and dismissals. Up to that time the Board had refused to accept MTI's proposals as concerns either issue. During such discussion the Board changed its position in this regard. Indeed the Board by resolution agreed for the first time to accept binding arbitration of teacher renewals and dismissals and at the same time resolved to reaffirm its position against fair share. In effect the Board to some extent accepted the position proposed by the minority."

In support of its second principal contention MTI argues, in material part, as follows:

"If a majority bargaining representative proposes during negotiations that the parties agree upon a fair share agreement incorporating the same into a written collective agreement, the employer must meet and confer with such majority representative at reasonable times, in good faith, with respect to such conditions of

employment, with the intent of reaching an agreement thereon. While the employer is not compelled to agree to any fair share agreement proposed or to make any concession concerning the same, it is required to meet and confer at reasonable times relative to such agreement, in good faith with the intention of reaching agreement. The employer cannot negotiate publicly or privately with a minority as concerns fair share agreements or base its refusal to accept fair share on the premise that a number of bargaining unit teachers do not support a fair share agreement.

The statute does give the employer the right to petition the Commission for a referendum and does provide that such a petition must be supported by proof that at least 30% of the employees in the bargaining unit desire that the fair share agreement be terminated.

The statute therefore clearly permits the employer to receive from its employes, and through other than the majority representative, proof that such employes do not favor the fair share agreement. Obviously the proof may be obtained in unsolicited employe petitions.

When may the employer receive such proof? Certainly not during negotiations when in its decision making role it must decide whether to agree to a fair share proposal or not. It may only receive such information when a fair share agreement is already agreed upon by the employer and the majority bargaining representative and the question is does a majority of the bargaining unit employes favor the continuance of such agreement. ...

ERB 15.06 (of the Commission's rules) entitled "Stipulation for Referendum Seeking Authorization to Implement Fair-Share Agreement" provides that when a municipal employer and the majority

bargaining representative of its employes in their negotiations with respect to the inclusion of the fair-share agreement in their collective bargaining agreement, jointly desire to determine whether the employes in the involved collective bargaining unit favor the implementation of a fair-share agreement, such municipal employer and such labor organization, or anyone lawfully authorized to act on their behalf, may file a stipulation for a referendum for said purpose. Such stipulation must contain a statement by the municipal employer that it will incorporate a fair-share agreement into the collective bargaining agreement if the required number of employes vote in favor of implementing such agreement. Conversely, such Stipulation must contain a statement by the labor organization that it agrees to withdraw its request in negotiations for a fair-share agreement in the event the required number of employes do not vote in favor of the implementation of such agreement. Resort to such a stipulation and employe self determination through the election process then can only occur *after* the employer and the majority labor organization have come to agreement on a fair-share agreement.

There simply is no provision allowing or permitting the employer to poll his employes or to accept and consider a written poll of his employes as part of the decision making process in deciding whether to accept or reject a fair-share agreement.

An election may be had, in which employes can approve or disapprove of the continuation of a previously agreed upon fair-share agreement, pursuant to a Petition or a Stipulation. An election may also be had in which employes indicate whether or not they favor the implementation of a fair-share agreement, but only if the employer states in writing that it will incorporate a fair-share agreement into the collective bargaining agreement upon a favorable employe vote.

The employer cannot refuse or reject a fair-share agreement proposed in negotiations basing such refusal on the fact that a number, even a majority, of its bargaining unit employes have disclosed to it orally or in writing that they do not favor fair share.

Chaos would result if the rule were otherwise. If an employer could rely on petitions signed by a substantial minority of its employes or even a majority of its employes as the basis for rejecting fair-share agreements, the secret balloting provision of the election process established by the WERC would be rendered valueless.

A multitude of legal questions could and would arise as to the validity of the signatures on the petition, whether the employes understood what they were signing, whether the petition was unsolicited or whether it was obtained directly or indirectly through improper management persuasion, and so on.

Fair-share agreements simply are not unique subjects of bargaining upon which the employer can bargain with the minority either privately or in public.

In the instant matter the Board permitted Holmquist as the representative of an informal minority of bargaining unit employes to appear at a public meeting of the Board and to speak against the fair-share arrangements proposed by MTI as the majority bargaining representative. In doing so the Board consciously undermined the bargaining position of MTI as the majority representative of its bargaining unit employes."

The District, in support of its answer that the complaint should be dismissed, in its brief sets forth three basic contentions as follows:

1. The Board in permitting Holmquist to speak and present the petition involved, during an ordinary Board meeting and in the presence of MTI officials, acted within its duty "to recognize and respect the constitutional rights of all its employees to speak freely and petition their government.

2. The Board did not violate its duty to bargain with MTI or interfere with the rights of its employes, when in the presence of MTI officers "it merely listened to a representative of an informal committee of bargaining unit employees during the public appearance portion of a regularly scheduled meeting, read a petition concerning 'fair share' circulated among Madison teachers and heard that 417 teachers had signed the petition".

3. The Board acted "in conformity with its responsibilities under Section 111.70" in listening to Holmquist regarding negotiable matters, receiving information, thoughts or sentiments of employes in the bargaining unit "in the absence of an express or implied desire by the employer to deal directly with the employes and affirmative action soliciting or inducing the employees to deal directly with" the board.

In support of its first argument the District contends that the First Amendment to the federal constitution,/[5] as well as Article I, Section 3 of the Wisconsin Constitution,

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/[5]Citing Pickering v. The Board of Education, 391 U.S. 563 (1968).

guarantees the right of persons to petition the government or any party thereof, and the right to speak and publish sentiments freely. Therefore the District concludes that all teachers in its employ, as citizens, "possess the right to speak freely and the right to petition" the Board, and that the Board has the responsibility to refrain from obstructing such right.

Secondly the District argues that it recognizes its duty to bargain exclusively with MTI on the issue of a fair share agreement, however, that the Board's action in the meeting involved with respect to listening to Holmquist did not constitute a failure in its duty to bargain with MTI.

In support of its third basic argument the District, in its brief argues, in part as follows:

"There is no evidence in this record that either the Board of Education recognized an obligation or intended to assume an obligation to meet and confer with Mr. Albert Holmquist or his group at reasonable times with an intention of reaching an agreement with those individuals. There is no evidence, expressed or implied, that the Board wished to deal with persons other than the certified representative. Further, there is no evidence to indicate the Board or Administration solicited or induced direct dealing with employees in derogation of the collective bargaining representative. The Board merely received information. Listening is not bargaining.

It is also clear Mr. Holmquist's remarks cannot be considered 'collective bargaining' within the statutory definition. Mr. Holmquist merely wished to inform the *bargaining parties* that some teachers were confused about the 'fair-share' proposal presently on the bargaining table. His testimony indicates that he was

not interested in establishing a bargaining relationship with the Board of Education. On the contrary, his remarks clearly recognized that Madison Teachers Incorporated was the exclusive bargaining representative for the teachers. His efforts were aimed at getting the bargaining parties off dead center, not undermining the majority representative.

Mr. Holmquist recognized the Board of Education and Madison Teachers Incorporated as the sole bargaining parties for the teachers in the District. Additional support for this suggestion can be seen in the petition itself which was read to the Board. The petition is addressed to Madison Teachers Incorporated and the Board of Education. Transcript Page 94.

The act of the Board of Education in permitting Mr. Holmquist to speak cannot be considered 'collective bargaining' in light of the statutory definition.

Section 111.70 (4) (d) of the Wisconsin Statutes (1971) provides additional support for the Respondent's position that an employer may receive information from and listen to bargaining unit employees concerning bargaining matters without running afoul of its responsibilities under the act.

The only contact between Mr. Holmquist and the Board of Education or the School Administration was in the presence of the officials of the majority representative of the teachers of the District. Indeed, on December 6th, the President, Executive Secretary and Chief Negotiator for Madison Teachers were present in the audience when Mr. Holmquist made his statement. The statute safeguards the right of an employee to communicate with an employer. In this came the Board merely listened and, in so doing, allowed what is declared lawful by statute.

Finally, the legislature has provided a procedure by which a union security agreement entitled 'Fair-Share' may be terminated. Section 111.70 (2) Wisconsin Statutes (1971). This procedure may be initiated by an employer or a labor organization upon a 30% showing of interest by the employees in the bargaining unit. This section thus assumes that unsolicitated information from employees concerning 'fair-share agreements' may be received after an agreement on fair-share by the parties. It thus further assumes that receipt of information by the employer after an agreement from dissenting members of the bargaining unit is not 'bargaining' or 'negotiating' with third parties.

The Complainant argues that this legislative enactment merely allows the receipt of information from employees after agreement and, therefore, does not presume that an employer may receive information prior to agreement on fair-share. However, the Complainant misses the point of the argument. Complainant's argument suggests that the receipt of information on negotiable matters from employees prior to the agreement is bargaining while receipt of information after agreement with the bargaining representative is not bargaining. He presumes that the legislature would allow bargaining by third parties after an agreement had been reached but prevent bargaining by third parties before an agreement was reached. This argument does not make sense.

It is more consistent with the intent of the act to suggest that the legislature understood that the mere receipt of information is not 'bargaining' prior to or after a collective bargaining agreement is reached and thus, it established a procedure where it is presumed the employer will receive information. The Complainant's argument suggests that the legislature

would sanction activity considered direct bargaining after an agreement was reached but prohibited activity considered direct bargaining before agreement. The Respondent suggests the legislature understood listening and receiving information is not bargaining."

In support of its argument that an employer may receive information concerning bargaining matters from employes and discuss matters of collective bargaining with employes and listen to negative information "about the majority representative without violating its duty to bargaining and without interfering with the bargaining rights of its employes", the District cites a number of decisions of the National Labor Relations Board./[6]

Further, the District would distinguish the instant events from the applicability of Wisconsin Supreme Court's decision in *Milwaukee Board of School Directors, supra,* contending that the Board meeting of December 6th was "an ordinary meeting of the Board" and not "a public bargaining session or the meeting at which the Board was to take final action on the Negotiated Agreement with the majority representative". In addition the District contends that herein Holmquist merely gave a position statement, and that the "Supreme Court suggested that under these circumstances it would have some difficulty in labeling the conduct 'negotiating' ", and therefore not violative of the Act.

/[6] *White Sulphur Springs Co.* CA DC (1963) 316F. (2d) 410; *Lawn Boy Div. Outboard Marine Corp.*, 143 NLRB 535, (1963); *Baldwin County Electric Membership Corp.*, 145 NLRB 1316 (1964); *Coast Broadcasting Corp.*, 151 NLRB No. 117 (1965); *American Printing Co.*, 173 NLRB No. 17 (1968); *Tobasco Concrete Co.*, 177 NLRB No. 101 (1965).

The District contends "to suggest that a municipal employer must stifle a minority organization would obviously be action that would discourage membership in a minority organization and encourage membership in the majority union, a clear violation of Section 111.70 (3) (a) 3 of the Wisconsin Statutes."

Finally, the District argues that Article II, 2 of the collective bargaining agreement existing between the parties contemplated the activity involved herein.

In its brief amicus the National Right To Work Legal Defense Foundation supports the argument of the District that to require the Board to "stifle the speech of a teacher removes the constitutional protection for freedom of expression"; that the *Milwaukee Board of School Directors case* is distinguishable from the instant matter, contending that Holmquist's remarks "cannot be interpreted as negotiation"; that there is no evidence that the Board was motivated to undermine the MTI as the certified bargaining representative; and that Sec. 111.70 (4) (d) 1 protects the right of individual employes to present grievances.

In its reply brief MTI contends that had the Board denied Holmquist the opportunity to speak it would not have infringed upon or abridged Holmquist's right of free speech, since "freedom of speech" cannot be used to engage in conduct constituting a refusal to bargain in good faith with MTI as the exclusive bargaining representative.

With respect to the District's argument that federal cases support a conclusion that in permitting Holmquist to speak the Board did not fault its duty to bargain with MTI, the latter argues that the cases cited by the District are not

in point, but, on the contrary, the factual situations therein are distinguishable from those in the instant proceeding. MTI attacks the District's contention that the Board acted in conformity with its responsibilities under MERA in listening to bargaining unit employes on negotiable matters or discusses such matters with employes in the absence of the bargaining representative in the absence of an expressed or implied desire "to deal directly with the employes and affirmative action soliciting or inducing employes to deal directly" with the Board. MTI argues that a finding of prohibited interference does not require a finding of anti-union animus./[7]

Further, MTI contends that the total conduct of the Board's agents, including the permitting of the distribution of letters to teachers through teacher mailboxes, the circulation of the petition in the school buildings, all with the permission of the principals involved, permitting Holmquist to speak at the Board meeting, and the timing of the Boards's final offer, are supportive of a conclusion that the Board committed prohibited practices as alleged.

In reply to the defense that the Board's action with respect to the receipt of the petition was consistent with Article II, 2 (d) of the collective bargaining agreement between the parties, MTI replies as follows:

> "Section 2 (c) makes it crystal clear that matters which are the proper subject of negotiations are to be dealt with by the authorized agents and only the authorized agents of the respective parties. It is

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/[7] *City of Milwaukee* (8420) 2/68.

> improper for a principal to the agreement on the one side and a group which is neither principal nor agent, on the other side, to discuss matters which are proper subjects of negotiation. Neither party in such a discussion is properly taking part in such discourse. Any such action, by the express terms of Article II 2(c) is in direct violation of the Agreement.
>
> Article II 2 (d) simply makes it clear that each party has the duty to bring to the attention of the other any such deviation from the proper negotiating process. If others than an authorized party should bring matters, which are the proper subject of negotiations, to one of the parties to the Agreement, such party has the duty to promptly notify the other party of that fact so that any problems caused by such improper conduct may be quickly resolved. Section 2 (d) provides a procedure to remedy improper activity in negotiations; its purpose is not to provide a vehicle to admit unauthorized parties into the negotiation process.
>
> When paragraphs 2 (c) and 2 (d) of Article II (A) of the Negotiated Agreement, entitled 'Conference and Negotiation' are read together, as they must be, it is clear that the Negotiated Agreement does not support the position advanced by the Respondent."

In reponse to the Board's contention that the receipt by the Board of a showing of interest opposing a fair share agreement does not constitute bargaining or negotiation, MTI contends that MERA does not permit a municipal employer to accept or consider a written poll of its employes as part of its decision with respect to the acceptance or rejection of a proposal with respect to a fair share agreement, since the statute does not require any balloting of employes prior to the implementation of a fair share agreement, and that a showing of interest executed

by at least 30% of the employes in the unit is necessary only to initiate a vote to determine whether an existing fair share agreement should be continued.

Finally, the MTI contends that Holmquist's appearance and remarks before the Board cannot be considered a grievance as contemplated in Sec. 111.70 (4) (d) of the Act.

The Wisconsin Education Association, in its brief amicus, supports MTI's argument that a ruling that the Board violated its duty to bargain would not abridge Holmquist's constitutional rights; that anti-union animus need not be established to find a refusal to bargain in good faith; and that the only real issue herein involves whether the receipt of Holmquist's communication constitutes a violation of the Board's duty to bargain only with the exclusive representative. In that regard the WEA contends:

> "Holmquist told the Board what it wanted to hear, what it hoped would have a negative influence on the union's bargaining position. Would the Board have been as anxious to hear a speaker in opposition to Holmquist, or ten speakers, or 1,200 speakers? Would it care to hear 1,200 speakers on each of the 13 unresolved items that were then on the table? Would it care to hear 1,200 speakers on all of the items that were originally put on the table? And if 1,200 speakers is distinguishable from one speaker by virtue of their numbers, where would the line be drawn? The 'obligation to treat with the true representative ... and the negative duty to treat with *no* other'/[8] was a wise statutory policy. It has stood the test of time.

/8*NLRB v. Jones & Laughlin Steel Corp.* 501 U.S. 1 (1937).

Because of the wisdom of the policy and because of the havoc that the opposite could wreak on collective bargaining as a successful institution, all dealings outside of the recognized representative should be discouraged. In applying the term 'bargaining' to fact situations, it should be given broad construction to include everything but the most insubstantial, innocuous, and indeed unplanned communication between employers and employees. It should certainly include situations such as the present one where:

1. It related specifically to a demand the union had on the table;
2. it involved not a person speaking only as an individual, but rather as a representative;
3. it was preceded by planning and effort to gain support from other employees;
4. it was presented in a formal way at a meeting of the Board with all members present;
5. it was specifically intended to influence the Board in its dealings with the Union.

A contrary ruling in a case such as this would only be a formal invitation to dissident employees to address their employers on wages, hours, and conditions of employment. It would be an invitation to unions to stack employer's meetings with loyalists to defend their bargaining positions. It could make a mockery and a shambles out of collective bargaining."

Discussion

There are four basic issues which the Commission must determine herein. They are as follows:

1. Would the Board have violated Holmquist's right of constitutional free speech by denying him the opportunity to speak and orally present the petition involved?

If the Commission finds in the negative on Issue 1:

2. In permitting Holmquist to speak and orally present the petition, did the Board violate its statutory duty to bargain with MTI as the exclusive collective bargaining representative?

3. Does Article II, A of the collective bargaining agreement permit the activity involved without affecting the Board's duty to bargain?

4. Does the fact that Holmquist's presentation before the Board related to MTI's fair share proposal affect the Board's duty to bargain?

Issue 1

Holmquist appeared and orally presented the petition involved to the Board, not as an agent of MTI, the exclusive collective bargaining representative, but as a claimed representative of a minority of teachers who were opposed to the Board's granting of a fair share agreement. Our Supreme Court in *Milwaukee Board of School Directors, supra,* rejected the contention that prohibiting a representative of a minority union to speak before the school board, while the latter had not completed its negotiations with the majority organization, violated the constitutional rights of said minority representative./[9] We see no distinction in the fact that Holmquist did not represent a "minority organization". He did in fact represent a minority of the teachers, whose views were opposed to those of MTI with respect to a fair share

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/[9] The Court reversed the Commission's conclusion in said regard.

agreement. Therefore we conclude that the Board would not have violated Holmquist's constitutional right of free speech by denying him the opportunity to speak and orally present the petition involved.

Issue 2

In *Milwaukee Board of School Directors, supra,* the school board involved, on two separate occasions denied a representative of a minority organization the opportunity to speak at its open meeting. In said case our Supreme Court stated ".... if the minority union representative is permitted to influence the decision of the school board by his argument, then he is truly negotiating". Holmquist intended to influence the Board on the fair share issue. His statement is clear to that matter. After the public meeting the members of the Board went into executive session, returned and announced its offer to the MTI representatives, which rejected a fair share agreement. Whether the Board rejected the fair share proposal as a result of, or not a result of, Holmquist's remarks, is not necessary for the Commission to determine. The fact is that Holmquist's motive and purpose was intended to persuade the Board not to agree to the fair share agreement as proposed by the exclusive collective bargaining representative. The Board's activity with respect to the Holmquist incident, which occurred during the Board's open meeting, constituted an erosion of its duty to bargain exclusively with the MTI and with no other organization, group of employes, or a single employe. The cases cited by the District in its brief are not applicable to the circumstances involved in the instant proceeding.

Issue 3

Article II A. d. of the collective bargaining agreement existing between the parties at the time of the event involved, in our opinion, does not "legalize" the Board's activity with respect to Holmquist's remarks to the Board at its open meeting. The provision involved, when viewed in context with subpara c. of the Article, indicates that the Board and MTI agreed that negotiable subjects may only be negotiated by the Board and the MTI, even though such matters may be brought to the attention of either the Board or MTI. Various supervisory personnel of the Board were aware of Holmquist's activity prior to the open meeting. He could have properly presented his petition to the Board by means other than an appearance at the open Board meeting. If that would have occurred the Board was contractually obligated to immediately inform MTI thereof. Even if the Board members were not aware of Holmquist's intentions at the open meeting, prior to his remarks an inquiry should have been made as to the intent and purpose for which he sought to speak. Had he indicated the purpose of his appearance and remarks, the Board should have denied him recognition and informed him to submit a written statement to both the Board and MTI. Perhaps the recognition of Holmquist and the receipt of his oral statement was not motivated by any anti-union animus on behalf of the Board, nevertheless by so doing the Board did not fulfill its statutory duty to bargain in good faith with the MTI as the exclusive collective bargaining representative.

Issue 4

The pertinent portion of Sec. 111.70 (2) of MERA material to this particular issue reads as follows:

> "... except that employes may be required to pay dues in the manner provided in a fair-share agreement. Such fair-share agreement shall be subject to the right of the municipal employer or a labor organization to petition the commission to conduct a referendum. Such petition must be supported by proof that at least 30% of the employes in the collective bargaining unit desire that the fair-share agreement be terminated. Upon so finding, the commission shall conduct a referendum. If the continuation of the agreement is not supported by at least the majority of the eligible employes, it shall be deemed terminated...."

We do not agree with MTI that the statute does not permit an employer to accept or consider a written poll of its employes as part of its decision to accept or reject a fair share proposal. The statute permits the implementation of a fair share agreement without a referendum among the employes authorizing same. After the implementation of a fair share agreement, either the employer or a labor organization may file a petition for a referendum to determine whether the employes involved desire the continuation of the fair share agreement. Such a petition must be supported by a showing of interest of at least 30% of the employes in the unit involved. There is nothing in the statute which prohibits an employer from receiving a showing of interest opposing the fair share agreement prior to the implementation of a fair share agreement. The rules of the Commission provide for a stipulation requesting a referendum prior to implementation of a fair share agreement, provided therein the employer agrees to implement same should the required number of employes favor same, and, further, providing the union involved

agrees to withdraw its fair share proposal should the required number of employes not vote in favor thereof./[10]

The presentation of a showing of interest by the employes may very well have an impact on whether the parties will execute such a stipulation. And if so, the results of the referendum would be binding, and thus stabilize any possible issue with respect to the implementation of a fair share agreement. If the employes vote in favor of a fair share agreement, and such an agreement is implemented following the referendum, pursuant to the rules of the Commission,/[11] an isolation period for the conduct of a subsequent referendum is established, thus further stabilizing the collective bargaining relationship.

However, in the instant proceeding, the manner in which the Board received the "showing of interest", namely permitting Holmquist to speak on a bargaining issue at an open Board meeting, exceeded the bounds of permissable conduct with reference to the receipt of a showing of interest requesting the conduct of a referendum, either seeking an initial referendum or, assuming an existing fair share agreement, a subsequent referendum.

Conclusion

In accordance with the above rationale the Commission has concluded that the District, by its Board, committed prohibited practices as alleged in the complaint. The Commission does not deem it necessary to effectuate the policy of MERA to require the Board to

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/[10]ERB 15.03.

/[11]ERB 15.11 (2) (c).

expunge from its official minutes any references therein relating to the appearance and remarks of Holmquist at the December 6, 1971 meeting. However, it has ordered the School Board to incorporate the Commission's decision in its official minutes.

Dated at Madison, Wisconsin, this 13th day of September, 1971.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

By *Morris Slavney /s/*
Morris Slavney, Chairman

Zel S. Rice II /s/
Zel S. Rice II, Commissioner

Jos. B. Kerkman /s/
Jos. B. Kerkman, Commissioner
Commissioner

STATE OF WISCONSIN DANE COUNTY
CIRCUIT COURT

CITY OF MADISON, Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke and its Agent, The Board of Education, City of Madison Joint School District No. 8,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

PETITION FOR REVIEW

Now comes the above-named Petitioner by Edwin Conrad, City Attorney and Gerald C. Kops, Assistant City Attorney, their attorneys and respectfully petitions the Circuit Court of Dane County, Wisconsin pursuant to Section 227.16 of the Wisconsin Statutes (1969) for a review of the decision made and entered by the Respondent on September 13, 1972 in its proceeding entitled *Madison Teachers Incorporated v. Joint School District No. 8, City of Madison, et al,* Case No. VIII No. 15210 MP-107, Decision No. 11271 and as the basis of this Petition, respectfully alleges as follows:

1. The Petitioner, City of Madison, Joint School District No. 8 through its agent, the Board of Education of the City of Madison, Joint School District No. 8, operates a school system pursuant to Subchapter II of Chapter 120 of the Wisconsin Statutes (1969). Among the powers granted to the School Board is the power to adopt rules for its meetings and deliberations and the power to employ teachers.

2. Madison Teachers Incorporated is a labor organization and the exclusive collective bargaining representative for all regular full-time and regular part-time certificated teaching personnel employed by the Board of Education, City of Madison, Joint School District No. 8 pursuant to a certification of representation decision of the Wisconsin Employment Relations Board on June 7, 1966, Case No. I No. 9691 ME-150, Decision No. 6746.

3. A regular meeting of the Board of Education was held on December 6, 1971. At that regular meeting of the Board of Education, during the portion of the meeting

entitled "Public Appearances", the Board of Education listened to a teacher-employee of the Board and received the results of a petition circulated among teachers employed by the District.

4. On January 6, 1972, Madison Teachers Incorporated filed a complaint with the Wisconsin Employment Relations Commission alleging that the Board of Education, City of Madison Joint School District No. 8, committed a prohibited labor practice when it listened to the teacher-employee at its regular meeting of December 6, 1971.

5. The Board of Education denied the allegation.

6. A hearing in the matter was conducted on February 28, 1972 by the Wisconsin Employment Relations Commission with Chairman Morris Slavney presiding and Commissioner Zel S. Rice, II also present.

7. On September 13, 1972, the Wisconsin Employment Relations Commission issued Findings of Fact, Conclusions of Law, and an Order in the matter. A memorandum also accompanied the Findings of Fact, Conclusions of Law, and Order.

8. The Wisconsin Employment Relations Commission determined that the Petitioner violated its duty to bargain in good faith with Madison Teachers Incorporated when it listened to a teacher-employee at its regular meeting and interferred with the rights of employees represented by Madison Teachers Incorporated to bargain collectively with representatives of their own choosing and thereby committed prohibitive labor practices within the meaning of Section 111.70(3)(a) 4 and 1 of the Municipal Employment Relations Act.

9. Pursuant to this determination, the Wisconsin Employment Relations Commission ordered the Board to cease and desist permitting teacher employees, other than representatives of Madison Teachers Incorporated, from appearing and speaking at meetings of the Board of Education on matters subject to collective bargaining between the Petitioner and Madison Teachers Incorporated. The Commission also ordered the Board to incorporate the Findings of Fact, Conclusions of Law, and Order in the minutes of the Board of Education and immediately notify Madison teachers that the Petitioner will not permit any employee in the bargaining unit represented by Madison Teachers Incorporated other than a representative of Madison Teachers Incorporated to appear and speak on matters subject to collective bargaining between the Petitioner and Madison Teachers Incorporated, and further, notify the Wisconsin Employment Relations Commission within thirty (30) days of receipt of a copy of the Order as to what steps the Petitioner had taken to comply therewith.

10. The Board of Education recognizes its statutory duty to bargain in good faith exclusively with the certified representatives of its employees but contends that full compliance with this statutory obligation does not, should not and cannot abridge its constitutional and statutory rights, privileges and obligations as elected representatives of the people; to listen and receive information at public meetings from its employees on matters of wages, hours and conditions of employment and thus, is aggrieved, interested and directly affected by the decision.

11. The decision of the Wisconsin Employment Relations Board should be reversed on the following grounds:

a) The decision is contrary to Petitioner's constitutional rights, obligations and privileges.

b) The decision of the Respondent is in excess of the statutory authority and jurisdiction of the agency and affected by other errors of law.

c) The decision of the Respondent is unsupported by substantial evidence in the view of the entire record as submitted.

d) The decision of the Respondent is arbitrary and capricious.

WHEREFORE, the Petitioner prays that the Court review the proceedings conducted by the Respondent, the evidence taken thereon and the decision entered therein and reverse said decision of the Wisconsin Employment Relations Commission entered September 13, 1972 in the matter of *Madison Teachers Incorporated vs. Joint School District No. 8, City of Madison, et al.*, Case No. VIII No. 15210 MP-107, Decision No. 11271 and further prays that the Court stay enforcement of the Order of the Commission during the time required for review of the decision and grant such further relief as may be deemed appropriate.

Dated at Madison, Wisconsin this 13th day of October, 1972.

Respectfully submitted:

CITY OF MADISON

By: */s/ Gerald C. Kops*

GERALD C. KOPS
Assistant City Attorney

STATE OF WISCONSIN)
: ss
COUNTY OF DANE)

Gerald C. Kops, being first duly sworn on oath deposes and says that he is an Assistant City Attorney of the City of Madison, a municipal corporation located at Dane County, Wisconsin; that he has read the above and foregoing Petition and that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters, he believes it to be true.

/s/ Gerald C. Kops
GERALD C. KOPS

Subscribed and sworn to before me
this 13th day of October, 1972.

/s/ Larry W. O'Brien
Notary Public, State of Wisconsin
My Commission is permanent

STATE OF WISCONSIN CIRCUIT COURT
DANE COUNTY

CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT, THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent,

MADISON TEACHERS INCORPORATED,

Intervenor Respondent.

MEMORANDUM DECISION

The petitioner in this action pursuant to Chapter 227, Stats., seeks review of a decision and order of the Wisconsin Employment Relations Commission dated September 13, 1972, which determined that said petitioner had committed unfair practices prohibited by sec. 111.70 (3) (a) 1 and 4 of the Municipal Employment Relations Act.

The petitioner (hereinafter "school board") and Madison Teachers, Inc. (hereinafter "MTI") were parties to a labor agreement covering teachers and other employees, which ran from January 1, 1971, to December 31, 1971. Said agreement contained, inter alia, a provision that the school board would bargain exclusively with MTI.

On January 25, 1971, MTI gave the school board timely notice of its desire to modify the existing agreement for the year 1972. Conferences and negotiations between the parties for a successor agreement continued during the year until October 4, 1971. By November, 1971, two primary issues remained unresolved, viz., a fair share agreement and binding arbitration of teacher nonrenewals and dismissals.

In November, 1971, a Mr. Holmquist and a Mr. Reed, both of whom are teachers employed by the school board and both of whom are not members of MTI, drafted a letter addressed to "Dear Fellow Madisonian Educator." Such letter, headed "E. C. - O. L. O. G. Y," meaning "Educator's Choice - Obligatory Leadership Or Goverance by You," asked the addressee to "Save Freedom of Choice" and stated that "A Closed Shop (agency shop) Removes This Freedom." The bottom portion of such letter was in the form of a ballot allowing the addressee to express his opposition to "agency shop." Said letter was mailed on November 14, 1971, to all teachers in the Madison Public School system by Holmquist and Reed. Approximately two hundred replies to such letter were received, the majority of which were favorable to their position on fair share.

On December 2, 1971, a meeting of 14 teachers who wished to work against any fair share agreement resulted in a memorandum entitled "Points of Information" and a petition which were distributed to the teachers employed by the School District.

Prior to the December 6, 1971, school board meeting, Mr. Keith Yelinek, a member of the board, was informed that individuals other than authorized agents of MTI intended to speak at such meeting on fair share. Mr.

Yelinek was presented with copies of the court's decision in *Board of School Directors of Milwaukee v. W.E.R.C.*, 42 Wis. 2d 637 (1968), and he indicated he would relate such information to the board.

Mr. Holmquist appeared at the board meeting held on December 6, 1971, and he was permitted to speak to the board. Mr. Holmquist prefaced his remarks to the board by stating:

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package."

He then read to the board the text of a petition he had circulated among bargaining unit teachers dated December 6, 1971. In so doing, he stated as follows:

> "To: Madison Board of Education, Madison Teachers Incorporated. We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair share proposal. 4) The results of this written ballot be made public.

"We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the 'whole package' and therefore is not issue specific. ... Neither has properly addressed the serious issue of fair share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it. For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation."

At the end of his remarks, Mrs. Doyle, president of the Board of Education, asked Mr. Holmquist, "Do you intend to communicate these petitions to the Board when you have them all?" Mr. Holmquist replied, "Yes."

After the meeting the board went into executive session. As a result of such discussion, the following resolution was adopted:

> "It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and *not* including agency shop; if the MTI does not accept this as a total package the offer of arbitration is withdrawn."

In later negotiations the board remained adamant in their position and the parties finally accepted such as the Agreement on December 14, 1971.

On January 5, 1972, MTI filed a complaint with the Wisconsin Employment Relations Commission against the board for alleged violations of sec. 111.70 (3) (a) (1) and 111.70 (3) (a) (4), Stats. The Commission issued its Findings of Fact, Conclusions of Law and Order on September 13, 1972. The petition seeking review of such Findings, Conclusions, and Order is presently before the court.

The court is of the opinion that denying a representative of a minority of the bargaining unit employees the right to appear at a public meeting of the board and to speak to the board on mandatory subjects of bargaining does not infringe upon the right of freedom of expression or the right to petition one's government, as guaranteed by the Wisconsin and United States Constitutions.

The Wisconsin Supreme Court in *Board of School Directors v. W.E.R.C.*, 42 Wis. 2d 637 (1968), held that a school board could properly deny the representative of a minority union the right to speak at a public meeting of the school board on negotiable matters and that such denial did not infringe upon the right of free speech as guaranteed by the Wisconsin Constitution.

The court held that a minority union had no right to negotiate with the employer and that, if the employer negotiated with the minority union, that in itself would be a prohibited practice. As the court stated in *LaCrosse County Institution Employees v. W.E.R.C.*, 52 Wis. 2d 295, 300 (1971):

> "The essence of the *Board of School Directors* case was merely that, if a municipality sees fit to bargain, it must do so with the certified representative of the

employees and cannot negotiate with a minority union."

The crux of this case thus reduces to whether Holmquist's "statement" before the board constituted "negotiation" or was merely the giving of a "position statement." This same issue was extensively discussed in the *Board of School Directors* case, supra. The court stated at page 652:

> "If this case involved solely the giving of a position statement at an ordinary meeting of a public body, we would have some dif lty in labeling the conduct 'negotiating.' "

Even though Holmquist's statement superficially appears to be merely a "position statement," the court deems from the total circumstances that it constituted "negotiating." The court in *Board of School Directors*, supra, at page 653 stated:

> "On the other hand, if the minority union representative is permitted to influence the decision of the school board by his argument, then he is truly 'negotiating.' "

In the case at bar, Holmquist in fact desired to have the fair-share proposal deleted from the agreement. In addition, the school district did not remain passive in relation to this matter. When Reed and Holmquist commenced their anti-fair-share campaign, they showed their anti-fair-share document entitled "E. C. - O. L. O. G. Y." to building principals. They also received permission to circulate the "informational letter" to teachers through the teacher mail boxes. They were also permitted to circulate their anti-fair-share petition to teachers in the school buildings. Such permissiveness was

in direct contradiction to Article V, paragraph J, at page 57, and Article V, paragraph K, at page 57, of the negotiated agreement in effect between MTI and the board. Thus, the board's conduct involved more than its permitting Holmquist to speak to it on fair-share. It involved conduct which could only have for its purpose the frustration of the rights of the majority.

The court is also of the opinion that the decision of the Wisconsin Employment Relations Commission is reasonable and is not inconsistent with the requirements of sec. 111.70 (3) (a) (3), Stats. Such decision does not require the employer to refuse to meet its statutory obligations under sec. 111.70 (4) (d), Stats., nor is it contrary to the intent of sec. 111.70 (2), Stats.

Accordingly, the Findings and Order of the Commission are affirmed. Counsel may prepare an appropriate judgment for the court's signature.

Dated: October 2, 1973.

BY THE COURT:

William C. Sachtjen
William C. Sachtjen, Judge

cc: Attys. Kops, Hoornstra,
Kelly, Ruhly

STATE OF WISCONSIN DANE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

JUDGMENT

Circuit Court
Case No. 137-382

The above entitled matter having come on for hearing on the 28th day of August, 1973, at which time it was heard before the court without a jury; Melli, Shiels, Walker & Pease by Joseph A. Melli appearing for the amicus curiae, National Right To Work Foundation; Charles D. Hoornstra, Assistant Attorney General, appearing on behalf of the respondent, Wisconsin Employment Relations Commission; Robert C. Kelly appearing for the intervenor respondent, Madison Teachers Incorporated; and Gerald C. Kops, Assistant City Attorney, appearing for the above-named petitioners; and the court having heard the arguments and considered the briefs of counsel and being duly advised in the premises, and having taken the matter under advisement and having on the 2nd day of October, 1973, filed its decision directing judgment dismissing the petition for review of a certain order of the Wisconsin Employment Relations Commission,

NOW, THEREFORE, IT IS ADJUDGED that the order of the Wisconsin Employment Relations Commission in this matter entered on the 13th day of September, 1972, be, and the same is affirmed; and that the petition of the above-named petitioners for review of said order be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this *12* day of *October*, 1973.

BY THE COURT:

/s/ William C. Sachtjen
William C. Sachtjen
Circuit Judge

STATE OF WISCONSIN IN SUPREME COURT

[Caption omitted in printing]

APPEAL from a judgment of the circuit court for Dane county: WILLIAM C. SACHTJEN, Circuit Judge. *Affirmed.*

DAY, J. The question on this appeal is, was it error for the circuit court to affirm the conclusion of the Wisconsin Employment Relations Commission that the school board committed a prohibited labor practice in that it "negotiated" or "bargained" with other than the exclusive bargaining representative of the teachers on matters subject to collective bargaining when it allowed a representative of a minority group of teachers to speak at a board meeting, listened to his statements and received the results of a petition circulated by that group — all concerning matters subject to collective bargaining — when this was done at a regular public meeting of the board?

The appellant City of Madison Joint School District No. 8, including the City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke (hereinafter "school district")

operates the school system of said municipalities; the appellant Board of Education of the district is an agent of the district and is charged with the possession, care, control and management of the property and affairs of the school district.

The respondent Wisconsin Employment Relations Commission (hereinafter "WERC") is an administrative body charged with the responsibility of administering statutory policy with respect to both public and private employees.

Madison Teachers, Incorporated (hereinafter "MTI"), intervenor respondent, is a labor organization which was, at the time of the events which give rise to this action, the exclusive majority collective bargaining representative of the teachers of the district.

The Board of Education (board) and MTI were, for the calendar year 1971, parties to a collective bargaining agreement covering wages, hours, and conditions of employment for all bargaining unit personnel, which included all teachers. The agreement terminated on December 31, 1971. Negotiations for a successor agreement began almost as soon as the previous one concluded. Thus, on January 25, 1971, MTI submitted a proposal for a new contract to take effect January 1, 1972. This proposal containeda "fair share" provision, a contractual requirement that all teachers, including those not then members, pay full union dues, *i.e.*, their "fair share" of the costs of collective bargaining.

Such a provision was proposed by MTI the previous year and was rejected by the board. This fair-share provision was discussed throughout the 1971 negotiations and at all times was opposed by the board. Initially, the

board objected because such a provision was then illegal. There were frequent requests by the board for MTI to defer fair share for another year.

On November 11, 1971, legislation (ch. 124, Laws of 1971) became effective which allowed inclusion of a fair-share provision in municipal-employee collective-bargaining agreements. This is now codified as sec. 111.70 (1), Stats., and defined in sec. 111.70(1)(h). Soon thereafter MTI submitted another fair-share proposal to conform to the new law; again it was rejected by the board.

The number of unresolved issues between the parties had been reduced to about 13 by November, 1971. Two of these were considered of overriding importance by both sides: (1) the fair-share provision, and (2) the provision for binding arbitration of non-renewal of teacher contracts and teacher dismissals. The board had opposed both of these issues throughout the negotiations. However, in late October or early November, the chairman of the board's negotiating team indicated, informally and unofficially, to the chairman of MTI's negotiating team that there was "no way" arbitration for dismissals and non-renewals would be accepted by the board, but there was a "distinct possibility" the fair-share provision could be accepted. He said two members of the board said they would approve fair share if MTI would withdraw its arbitration proposal.

On the other hand, at the WERC hearing in this case, the chairman of MTI's negotiating team testified that the union's bargaining strategy was to lead the board to believe that MTI's primary interest was in fair share when in fact it was in arbitration. If this strategem were successful, MTI could at some point offer to "sacrifice" fair share for arbitration and celebrate the result.

On November 14, 1971, Ralph Reed and Albert Holmquist, teachers employed by the district, neither of whom were members of MTI, sent a letter opposing the fair-share provision, which they considered a denial of freedom of choice, to all teachers employed by the district. The letter solicited responses and 200 were received, the majority sympathetic to their position. A meeting of some of these teachers was scheduled for December 2, 1971. Fourteen teachers attended, half of whom were MTI members. They prepared a petition and formulated plans for circulating it in the schools on December 6, 1971. The petition supported a one-year deferral of consideration of fair share. It was intended to present the results of the petition to both MTI and the board at the board's regular public meeting on the evening of December 6, 1971. The petition was circulated in the schools, in non-working areas on non-working time, that day and a letter, also urging deferral of fair share, was distributed to the teachers of two schools through their school mailboxes. The principals of those two schools, agents of the board, knew of the latter activity.

By December 6, 1971, negotiations between the board and MTI had reached an impasse. For the board's regular public meeting that evening MTI had arranged to have pickets present and 300-400 teachers in attendance at the auditorium. MTI's representative John Mathews knew in advance that Messrs. Reed and Holmquist intended to present the results of their petition and speak to the board against fair share. He encountered Mr. Holmquist and Mr. Reed in the auditorium before the meeting was to begin and tried to talk them out of presenting the petition or speaking to the board.

Soon thereafter, Mr. Mathews met a member of the board, Mr. Yelinek, outside. He informed Mr. Yelinek of what Messrs. Reed and Holmquist intended to do that evening and also showed him underlined portions of the *Board of Sch. Directors of Milwaukee v. WERC* (1969), 42 Wis. 2d 637, 168 N.W. 2d 92. Mr. Yelinek responded that he "would take care of it."

Mr. Mathews met Messrs. Reed and Holmquist again, soon after talking with Mr. Yelinek. He again tried, unsuccessfully, to talk them out of presenting the petition and speaking to the board, telling them that the negotiations were delicate and urging them to refrain "or we were going to lose the whole ball game."

At the board meeting, a portion of time was devoted to public appearances. Mr. Holmquist completed a registration form stating that he wished to speak during this period. He did not say on this form what he wished to speak about. Several individuals spoke during this time and then the president of MTI rose and spoke. At the conclusion of his remarks he presented to the board a statement signed by 1300 to 1400 teachers, declaring "We, the undersigned wish the parties to resume negotiations and reach agreement as quickly as possible."

Immediately following this speaker, Mr. Holmquist was allowed to speak. He said

> " 'My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers, Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package.' "

He then read the petition:

> " 'To: Madison Board of Education, Madison Teachers, Incorporated. We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers, Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair share proposal. 4) The results of this written ballot be made public.' "

He added:

> " 'We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the "whole package" and therefore is not issue specific ... Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it.
>
> For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation.' "

When he finished, the board president asked Mr. Holmquist whether he intended to communicate the petitions to the board. Mr. Holmquist replied that he did; the petitions, however, were never presented to the board. There was no other exchange between Mr. Holmquist and any member of the board.

After the public meeting, the board went into executive session and considered the unresolved collective-bargaining issues, since a negotiation session had been scheduled for the following day, December 7, 1971. The board adopted the following resolution:

> " 'It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and *not* including agency shop; if the MTI does not accept this as a total package, the offer of arbitration is withdrawn.' " (Emphasis the board's.)

At the next day's negotiations, the board's representatives opened the meeting with the above-quoted resolution and said, "... This is the deal." After some discussion, MTI conceded and tentative agreement was reached. The final agreement was signed December 14, 1971, with no fair-share provision, but with the arbitration provision.

In January, 1972, MTI filed a complaint with WERC alleging that the board committed a prohibited labor practice when it listened to Mr. Holmquist at its public meeting; this was said to constitute prohibited negotiating with other than the official, exclusive collective-bargaining representative, MTI. The board denied the charge. A hearing was held on February 28, 1972. On September 13, 1972, WERC concluded that the board had

committed the alleged prohibited labor practices and ordered the board to cease and desist from the same.

The board petitioned the Dane county circuit court for review under ch. 227, Stats. MTI intervened. On October 2, 1973, the court entered its written decision affirming the WERC conclusion and order. Judgment affirming WERC and dismissing the petition for review was entered October 17, 1973. The board appeals from that judgment.

The basic question on the appeal is, did the board commit an unfair labor practice under the fact situation outlined above? In addition, other questions have been raised on issues of constitutionality and statutory construction.

It could be argued that as a matter of policy the board should hear not only the majority union, but any minority union groups or ad hoc committee representatives to thereby get a cross-section of all views and ascertain what all employees think of the various issues subject to collective bargaining. Under such an argument the board and its bargaining representatives should listen to and exchange ideas with all these various groups and factions within a collective bargaining unit. But that is not how collective bargaining is to be carried out under our law.

This court has held that the majority organization in a particular labor bargaining unit is, under the Municipal Employment Relations Act (MERA), sec. 111.70, Stats., not only the bargaining representative for the members of that majority organization, but is the exclusive bargaining representative of all the employees, members or non-members, of the bargaining unit. *Board of Sch. Directors of Milwaukee v. WERC, supra,* at 645-647. *Accord, Board of Education v. WERC* (1971), 52 Wis. 2d 625, 191 N.W. 2d 242.

The statute also states that it is a prohibited labor practice for a municipal employer to refuse to bargain collectively with this exclusive majority representative. Sec. 111.70 (3) (a) 4, Stats. Further, it is a prohibited labor practice for the municipal employer "To interfere with, restrain or coerce municipal employes in the exercise of their rights ...," sec. 111.70 (3) (a) 1, one of which is the right "... to bargain collectively through representatives of their own choosing ...," sec. 111.70 (2). In this case, WERC concluded that the board, in allowing Mr. Holmquist to speak and in listening to his statement and his oral presentation of the results of his petition, had committed prohibited labor practices in violation of sec. 111.70 (3) (a) 1 and 4, in that it had violated its duty to bargain in good faith with MTI and had interfered with the rights of employees represented by MTI to bargain collectively through representatives of their own choosing. On this basis, WERC ordered, *inter alia,* that the board:

> "1. Shall immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc."

The WERC decision was affirmed by the circuit court.

The basic question here is whether or not the activities of the board at its public meeting constituted bargaining. The board of education in its brief concedes that bargaining by a minority group of employees with the board is prohibited by our law. In its brief the board states:

> "It may well be because of the public interest in stable labor relations permissible to restrict the rights of a minority group or individual teacher to negotiate with

their employer. However, we submit to prevent an employee from providing information to his employer orally is beyond the scope of permissible restriction of the Constitutional rights of public employees to speak and petition their government." ...

The Board of Education does not contest the assertion that it has an obligation to bargain exclusively with the majority representative of its employees or that a 'fair share' agreement is a matter of mandatory bargaining."

The United States /[1] and Wisconsin/[2] Constitutions protect the rights of individuals to speak and to petition their federal and state governments. But it is well established that these freedoms are not absolute./[3] To the

/[1]The First and Fourteenth Amendments to the United States Constitution, in pertinent part, are:

"Article I.

Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

"Article XIV.

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

/[2]The Wisconsin Constitution provides, in pertinent part, in Article I, Sections 3 and 4:

"Free speech; libel. Section 3. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech ..."

"Right to assemble and petition. Section 4. The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

/[3]*State v. Becker* (1971), 51 Wis. 2d 659, 664, 188 N.W. 2d 449; *State ex rel. Gall v. Wittig* (1969), 42 Wis. 2d 595, 606, 167 N.W. 2d 577; *State v. Zwicker* (1969), 41 Wis. 2d 497, 509-510, 164 N.W. 2d 512; *State v. Givens* (1965), 28 Wis. 2d 109, 118, 135 N.W. 2d 780.

extent that the WERC and circuit court decisions in this case infringe upon the freedom to speak and to petition the federal and state governments, they are within the limits imposed on the restriction of those rights by United States Supreme Court decisions and the decisions of this court. What is required to overcome the constitutional proscriptions on abridgement of these rights has been variously described as "... a clear and present danger that [the speech] will bring about the substantive evils that [the legislature] has a right to prevent," *Schenck v. United States* (1919), 249 U.S. 47, 52, 39 Sup. Ct. 247, 63 L.Ed. 470, or "... grave and immediate danger to interests which the State may lawfully protect," *West Virginia St. Brd. of Educ. v. Barnette* (1943), 319 U.S. 624, 639, 63 Sup. Ct. 1178, 87 L.Ed. 1628. Somewhat more recently the court has refined this language into a balancing test:

" 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' " *Dennis v. United States* (1951), 341 U.S. 494, 510, 71 Sup. Ct. 857, 95 L.Ed. 1137.

This question has been answered by this court and the United States Supreme Court in the field of labor negotiations. In *Board of Sch. Directors of Milwaukee v. WERC, supra,* this court recognized the right of the certified majority union to exclusive negotiating rights with the employer. *Accord, Board of Education v. WERC* (1971), 52 Wis. 2d 625, 633, 191 N.W. 2d 242. The principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts; the First Amendment rights of those persons are, to that extent, thereby infringed. But the gravity of that evil was considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations.

"The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining.... The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca v. Sipes* (1967), 386 U.S. 171, 182, 87 Sup. Ct. 903, 17 L.Ed. 2d 842; *cf., Medo Photo Supply Corp. v. NLRB* (1944), 321 U.S. 678, 684, 64 Sup. Ct. 830, 88 L.Ed. 1007; *accord, Texaco, Inc. v. N.L.R.B.* (7th Cir. 1971), 436 Fed. 2d 520, 524.

The question of whether speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to representatives of the majority bargaining unit has been answered in the affirmative. None of the parties to this action disputes that. Now the question is whether the activity herein complained of by MTI, and subsequently proscribed by WERC, qualifies as bargaining and can, therefore, be restricted under the rule of *Board of Sch. Directors of Milwaukee v. WERC, supra*. In that case, Justice Hanley speaking for a majority of this court defined "negotiating" as follows, p. 652:

"Quite obviously, the determination of this issue turns on the interpretation given to 'negotiating.'

'Negotiate' is defined in Webster's New International Dictionary (3d ed.) as:

'... 1: to communicate or confer with another so as to arrive at the settlement of some matter: meet with another so as to arrive through discussion at some kind of agreement or compromise about something: come to terms esp. in state matters by meetings and discussions....' "

In that case, the school board and the majority union were in the midst of negotiations on a new contract. At a public meeting of one of the committees of the school board, a representative of the minority union rose to speak on a matter which was a subject of negotiations. He was denied the right to speak. WERC considered this denial a prohibited practice. The circuit court reversed the WERC decision and was affirmed by this court; this court finding, in effect, that allowing the minority representative to speak on that subject would have constituted prohibited negotiating or bargaining with him. This court had to determine the interpretation to be given to "negotiating" and relied on the definition cited above. This court placed emphasis on the statutory requirement that no final action should be taken on such negotiated matters until they are made public and discussed in an open public meeting./[4] The court said that such "... open meeting is the necessary and final step in the 'negotiation' process between the school board and the majority teachers' union." *Board of Sch. Directors of Milwaukee v. WERC, supra,* at p. 653. Thus, it seems the court considered the school board committee meeting in that case to be a part of the "negotiation process." With the impasse that had been reached in the negotiations in the case before us with the majority union, with several members present at the board meeting, with its pickets present, and its representatives addressing the board on subjects of the collective

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/[4]" '... the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business.' " Sec. 14.90 (1) Stats. (1967), renumbered as sec. 66.77 (1), Stats. (1973). *See, Board of Sch. Directors of Milwaukee v. WERC, supra,* at p. 650.

bargaining negotiations, that meeting certainly was part of the negotiation process. The board relies heavily on the statement made by this court in that case, in which this court said:

> "If this case involved solely the giving of a position statement at an ordinary meeting of a public body, we would have some difficulty in labeling the conduct 'negotiating.' " 42 Wis. 2d at p. 652.

What was said in the case before us goes beyond the mere giving of a "position statement" because here the statement went to the very heart of the negotiations.

As the trial court in this case pointed out in its analysis of the facts:

> "In November, 1971, a Mr. Holmquist and a Mr. Reed, both of whom are teachers employed by the school board and both of whom are not members of MTI, drafted a letter addressed to 'Dear Fellow Madisonian Educator.' Such letter, headed 'E.C.-O.L.O.G.Y.,' meaning 'Educator's Choice — Obligatory Leadership Or Goverance by You,' asked the addressee to 'Save Freedom of Choice' and stated that 'A Closed Shop (agency shop) Removes This Freedom.' The bottom portion of such letter was in the form of a ballot allowing the addressee to express his opposition to 'agency shop.' Said letter was mailed on November 14, 1971, to all teachers in the Madison Public School system by Holmquist and Reed. Approximately two hundred replies to such letter were received, the majority of which were favorable to their position on fair share....
>
> Mr. Holmquist appeared at the board meeting held on December 6, 1971, and he was permitted to speak to the board....

> Even though Holmquist's statement superficially appears to be merely a 'position statement,' the court deems from the total circumstances that it constituted 'negotiating.' The court in *Board of School Directors*, supra, at page 653 stated:
>
> 'On the other hand, if the minority union representative is permitted to influence the decision of the school board by his argument, then he is truly "negotiating." '
>
> In the case at bar, Holmquist in fact desired to have the fair-share proposal deleted from the agreement...."

We agree with the trial court that this was in fact negotiating and one need only read the Holmquist statement to see that the "information" that was being imparted was a request that the whole fair-share issue be deferred along with a counter proposal as to how the issue should be handled for possible future consideration. It also criticized MTI's handling of the negotiations in this respect.

The statement given by Mr. Holmquist was more than a mere statement of a position; it was an argument for it. Furthermore, though Mr. Holmquist was not speaking for a minority union, as in the case of *Board of Sch. Directors of Milwaukee*, it is obvious he was speaking for an *ad hoc* group which was opposed to including a fair-share agreement in any contract being negotiated at that time.

The board also argues that the WERC order must be invalidated because it is vague; it fails to provide adequate guidelines for compliance with its terms. The WERC order directs the board to cease and desist from permitting employees, other than the representatives of MTI, from appearing and speaking at meetings of the board on

matters subject to collective bargaining. Matters subject to collective bargaining, as opposed to subjects reserved to management, are defined as "wages, hours and conditions of employment." Sec. 111.70(1)(d), Stats. The board argues that "conditions of employment" is constitutionally vague and, thus, the order must be voided.

The board, however, has no standing to raise the question. It has conceded in its brief and at oral argument that the matter spoken of by Mr. Holmquist before the board was a subject of collective bargaining. Thus, whatever the vagaries of the WERC order as it may or may not affect others, it is both a plain fact and conceded by the board that there is no vagueness in that order as it affects the board's conduct here.

> ". . . even if the outermost boundaries of [the prohibition] may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the 'hard core' of the ... proscriptions. ..." *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 608, 93 Sup. Ct. 2908, 37 L.Ed. 2d 830. *Accord, Paulos v. Breier* (7th Cir. 1974), 507 Fed. 2d 1383, 1387, 1388; *Driscoll v. Schmidt* (W.D. Wis. 1973), 354 Fed. Supp. 1225, 1229.

The law is clear that "(o)ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy* (1974) 417 U.S. 733, 94 Sup. Ct. 2547, 2562, 41 L.Ed. 2d 439. The board has no standing to raise the vagueness claim.

Furthermore, "wages, hours and conditions of employment" is the phrase commonly used to describe what are subjects of collective bargaining. It is used in the NLRA, 29 USC secs. 152(9) and 159(a). Certainly, "(w)ords

inevitably contain germs of uncertainty ...," *Broadrick v. Okla., supra,* at p. 608, but the test to avoid unconstitutional vagueness does not require crystal clarity:

> "There might be quibbles about the meaning of [certain language]; but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *United States Civil Service Commission v. Nat'l Assoc. of Letter Carriers, — AFL-CIO* (1973), 413 U.S. 548, 577-578, 579, 93 Sup. Ct. 2880, 37 L.Ed. 2d 796. *See also, Weber v. State* (1973), 59 Wis. 2d 371, 382, 208 N.W. 2d 396.

We conclude the order of the Wisconsin Employment Relations Commission of September 13, 1972, is not vague.

By the Court. — Judgment affirmed.

STATE OF WISCONSIN: IN SUPREME COURT

[Caption omitted in printing]

DISSENTING OPINION

ROBERT W. HANSEN, J. (*dissenting*). What is wrong with holding that only the spokesman for the designated bargaining agent of the teachers may speak on employment-related school matters at a public meeting of a public school board? What is wrong is that it denies the constitutional assurances as to freedom of speech and petition to individual school teachers and other teacher groups.

The First Amendment to the United States Constitution guarantees that "Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."/[1] The Wisconsin Constitution assures the right of every person to "... freely speak, write and publish his sentiments on all subjects ..." and to "... petition the government or any department thereof. ..."/[2] The United States Supreme Court has made clear that as a constitutional matter teachers may not be "... compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work. ..."/[3] These constitutional guarantees protect all citizens, public school teachers included, with the nature of the teaching

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/[1]Amendments to the United States Constitution, art. I, made applicable to states by the "due process" clause of the Fourteenth Amendment. *See Joseph Burstyn, Inc. v. Wilson* (1952), 343 U.S. 495, 72 Sup. Ct. 777, 96 L.Ed. 1098. *See also: Lawson v. Housing Authority of Milwaukee* (1955), 270 Wis. 269, 70 N.W. 2d 605, recognizing such applicability.

/[2]Wisconsin Constitution, art. 1, sec. 3, providing: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. ..." And, art 1, sec. 4, providing: "The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

/[3]*Pickering v. Board of Education* (1968), 391 U.S. 563, 568, 88 Sup. Ct. 1731, 20 L.Ed. 2d 811.

profession bringing "... the safeguards of those amendments vividly into operation."/[4]

We deal here with the right of a teacher to speak at a public meeting of a school board on school matters — during the portion of such meeting set aside for appearances by the general public./[5] During such citizens-invited-to-present-points-of-view part of the meeting, the president of the teachers' association that was the sole collective bargaining agent spoke for a fair-share

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/[4]*See: Wieman v. Updegraff* (1952), 344 U.S. 183, 73 Sup. Ct. 215, 97 L.Ed. 216, Mr. JUSTICE FRANKFURTER in concurring opinion (page 195) stating: "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice. ..."

/[5]The meeting involved was the regular and scheduled meeting of the board of education of the city of Madison, joint school district No. 8, on the evening of December 6, 1971. A portion of each regular meeting of this board is opened and devoted to appearances by the public, permitting concerned citizens to present their points of view on school matters to the board.

proposal,/[6] and presented a petition or statement signed by between thirteen and fourteen hundred teachers urging continued negotiations and early agreement. Then an individual teacher requested permission to speak, without indicating what he intended to talk about. Given such permission, he stated that he represented "... an informal committee of 72 teachers in 49 schools," urged further study of the fair-share proposal and stated he would submit a petition signed by teachers who favored delay for study. The school board permitted both the association president and the committee spokesman to speak and listened to both when they spoke.

The state employment relations board found that the Madison school board, by listening to the teacher who spoke after the president of the teachers' association had concluded his remarks, had committed a "prohibited practice" in violation of sec. 111.70 (3) (a) (1) and (4), Stats./[7] The employment relations board ordered the school board to "... immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of

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/[6]Sec. 111.70 (2), Stats., provides the procedure by which a union security agreement designated "fair share" may be established or terminated.

/[7]Sec. 111.70 (3) (a) (1), Stats., provides that it is a prohibited practice for a municipal employer "... (1) To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)." Sub. (2) provides that it is a prohibited practice "... (2) To initiate, create, dominate or interfere with the formation or administration of any labor or employe organization. ..." Sub. (4) provides that it is a prohibited practice "... (4) To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. ..."

the Board of Education, on matters subject to collective bargaining. ..." The circuit court upheld such order, and the majority of our court affirms.

The writer sees three constitutional infirmities in the employment relations board's order, all related to the First Amendment and the corollary state constitutional guarantees as to freedom of speech and right to petition for redress of grievances.

THE RIGHT TO SPEAK. When a school board sets aside a portion of its regular meeting as a public forum where citizens generally may state their views on school matters, the invitation and the right to appear go to all citizens, teachers included. The school board is a public body. The meetings are public meetings. Its open discussion periods are just that — open to the public, teachers included. The majority opinion finds the exclusion of teachers or teacher groups, other than the one designated as collective bargaining agent, was here justified and required by the State Municipal Employment Relations Act, which provides for an exclusive bargaining representative for an appropriate bargaining unit./[8] As to an individual's right to speak at a public hearing or a public meeting of a public body, we would see any duties or rights deriving from the Employment Relations Act as limited by rights granted by our constitutions, federal and state. If there is a crunch, it is the statute, not the constitutional right, that must yield. However, in the situation before us, the writer sees no crunch or conflict.

/[8]Subch. IV, secs. 111.70 to 111.77, Stats., the Municipal Employment Relations Act.

The association or union, selected as the bargaining agent for the employees, is the sole bargaining representative of the employees in bargaining sessions between employer and such bargaining agent. These meetings are not public. What the group, selected as sole bargaining agent in the election to select such representative, won was the right to represent the employees in the bargaining unit in bargaining sessions and negotiations with the employer. What it did not win was the right to speak, during a public discussion period, at a public meeting of a public body, with all other voices of individual teachers or groups of teachers to be silenced. The school board here is not required to conduct public discussion periods at its meetings while collective bargaining is going on. It is not required, the writer thinks, to hear any discussion of stated and specified topics or issues that are involved in the collective bargaining negotiations between it and the designated collective bargaining agent. But what it cannot do, much less be required to do, is to permit the representative of the employees for bargaining purposes to speak at a public meeting while a gag is placed over the mouths of all individual teachers or other teacher group representatives. This sauce of right to speak at a public meeting cannot be served to one, without being available to the others. It is true that, as to the right of a minority union to speak at a committee meeting dealing with matters involved in collective bargaining negotiations, this court did deny the right of minority unions to be heard at such meeting./[9] However, in that case, our court held:

/[9] *Board of School Directors of Milwaukee v. WERC* (1969), 42 Wis. 2d 637, 168 N.W. 2d 92. *See also: Board of Education v. WERC* (1971), 52 Wis. 2d 625, 191 N.W. 2d 242.

"If this case involved solely the giving of a position statement at an ordinary meeting of a public body, we would have some difficulty in labeling the conduct 'negotiating' "/[10] In the case now before us we do have "... solely the giving of a position statement at an ordinary meeting of a public body."/[11] Restrictions as to length, relevancy or to "giving of a position statement" raise no constitutional questions. They are all implicit in an invitation to appear at a public discussion at a public meeting of a public board. The writer has no quarrel with the Milwaukee case, as limited. However, the writer sees the exclusivity of bargaining representation in employer-employee relations as not here reaching or including the right of the designated representative to speak at a public forum portion of a school board meeting, with all other teacher voices to be silenced. Actually, the employment relations board order does not deny the right of the individual teacher to speak. It only denies the right of the school board to listen. But the right to speak with no one to listen is hardly what the constitutional guarantees envision or protect. The writer, under these circumstances, sees the right of the teacher to speak and the school board to listen as alike constitutionally protected.

/[10] *Id.* at page 652.

/[11] The teacher whose right to speak is here challenged also stated that he intended to present a petition signed by teachers in the school system. However, the order of the employment relations board holds only that permitting the teacher to speak exceeded the bounds of permissible conduct, apparently conceding that sec. 111.70 (2), Stats., authorizes and requires a municipal employer to receive a petition of employees as to a fair-share agreement.

CENSORSHIP OF CONTENT. As to the brief presentation here made by the individual teacher and spokesman for the informal teachers' committee, the majority finds it to have been "... more than a mere statement of a position; it was an argument for it." Unless a speaker takes a firm stand on both sides of the fence, it is difficult to see where a statement of position would not be for or against a proposal or proposition. Here the teacher who spoke identified himself and then read the text of the petition being circulated which he stated would be filed with the board. The petition asked study by an impartial committee. If this was argumentative, it was only mildly so. But the issue as to content of what was or might be said goes deeper. The majority defends the employment relations board order against the charge of vagueness. It finds no vagueness in the board order as it affects "... the board's conduct here." That is certainly true, but, in the First Amendment context, the question of scope or uncertainty as to future application goes to the chilling effect of the order upon the right of free speech. The employment relations board concluded that, when a teacher asks to speak to the board during a public discussion period at a regular board meeting, the board must inquire as to the nature of the speech. Then, if the topic is a matter subject to collective bargaining, the board must refuse to allow the teacher to speak. What matters are subject to collective bargaining? The statute provides that a municipal employer must bargain in good faith on matters of wages, hours and working conditions./[12] As

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/[12]Sec. 111.70 (1) (d), Stats., provides: " 'Collective bargaining' means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, *with respect to wages, hours and conditions of employment.* ..."[Emphasis supplied.]

appellant suggests, certain questions arise. Suppose the teacher wishes to speak on class size or teachers' aides, the establishment of summer programs, school reading projects, in-service training, or the special treatment and handling of problem students. Are these matters subject to collective bargaining on which the board is restricted from receiving information from teachers other than the majority representative of its employees? Nothing in the Municipal Employment Relations Act suggests that a teacher does not have a right to speak at a public meeting on these matters, yet all could be covered or affected by a collective bargaining agreement. It is in this sense that the department order is vague, not meaning that it cannot be understood and applied by this school board to the facts here, but because the difficulty of locating its outer limits will have a chilling effect both on the right of teachers to speak and school boards to listen on topics, arguably relatable to bargaining, but directly concerned with the well-being of school children and the community. The prudent school board would resolve doubts against the right of an individual teacher to speak on marginal or in-doubt topics, and that is what is meant by having a chilling effect. The writer would hold the order, in its scope and breadth, to have a constitutionally impermissible termperature-lowering effect on the exercise of First Amendment rights.

JUSTIFICATION FOR INFRINGEMENT. The majority opinion sets forth the federal and state constitutional guarantees of the rights of individuals to speak and to petition government for redress of grievances. It then concedes: "There can be no doubt that the WERC and circuit court decisions in this case infringe upon those

protected freedoms." Such infringement of a constitutional right, the majority writes and the writer agrees, may be permitted where there is a "... grave and immediate danger to interests which the State may lawfully protect."/[13] The question is whether the gravity of the dangers justifies the admitted infringement./[14] In the case before us, the majority holds, the gravity of infringing upon two rights, assured by federal and state constitutions, is "... considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations." The employment relations board was more restrained, seeing two "salutary purposes" served by its order — *i.e.*, it stabilizes the bargaining relations" and it serves the "unity of collective clout" which "advances the welfare of public employes." How can either statement of the public purpose served withstand the obvious fact that the danger alluded to could be entirely avoided by permitting no discussion at a public appearance portion of a regular school board meeting — by anybody — of specified topics and areas of discussion, announced and stated in advance of the public meeting. That would avoid treating a public meeting of a public body both as a collective bargaining session and as an opportunity for presentation of points of view by members of the public with only individual teachers silenced and not permitted to speak. Even if this individual teacher, speaking for himself or for his informal committee, were

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/[13] *West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624, 639, 63 Sup. Ct. 1178, 87 L.Ed. 1628. (Quoted in majority opinion.)

/[14] *Dennis v. United States* (1951), 341 U.S. 494, 510, 71 Sup. Ct. 857, 95 L.Ed. 1137. (Quoted in majority opinion.)

permitted to state his or their position during a public discussion period at a regular school board meeting, could grave danger, much less "chaos," be a likely or reasonably predictable result? This is no "shouting Fire in a crowded theater" situation. Any conflict between exclusivity in bargaining and the teachers' rights of free speech can be here entirely avoided by advance listing of topics that no one may discuss during the public-invited period of the school board meeting. The writer sees no reason here for holding that anyone except an individual school teacher or minority teacher group may speak freely on school affairs at a school board meeting. Town meeting type discussions at school board meetings are in the American tradition, but town meetings were open to everyone, not everyone except school teachers. Freedom of speech "... lies at the foundation of a free society,"/[15] and "... speech concerning public affairs is more than self-expression; it is the essence of self-government."/[16] The writer would reverse. As to teacher participation in a public discussion at a public meeting of a public body, the writer finds here no showing of facts present or danger threatened that either requires or warrants denying this teacher and any other teacher so situated, "... the First Amendment rights they would otherwise enjoy as citizens to comment on matters of

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/[15] *Shelton v. Tucker* (1960), 364 U.S. 479, 486, 81 Sup. Ct. 247, 5 L.Ed. 2d 231.

/[16] *Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 75, 85 Sup. Ct. 209, 13 L.Ed. 2d 125.

public interest in connection with the operation of the public schools in which they work...."[17]

I am authorized to state that Mr. Justice Bruce F. Beilfuss and Mr. Justice Connor T. Hansen join in this dissent.

STATE OF WISCONSIN
IN SUPREME COURT

[Caption omitted in printing]

MOTION FOR REHEARING

The Appellants named above, by their attorneys, Henry A. Gempeler, City Attorney, and Gerald C. Kops, Deputy City Attorney, hereby move this Court for rehearing in the captioned matter. The decision herein was filed June 30, 1975.

Dated this 18th day of July, 1975.

/s/ Henry A. Gempeler
Henry A. Gempeler
City Attorney

/s/ Gerald C. Kops
Gerald C. Kops
Deputy City Attorney

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[17] *Pickering v. Board of Education, supra,* footnote 3, at page 568.

PER CURIAM DECISION OF WISCONSIN SUPREME COURT

[Caption omitted in printing]

Motion for rehearing denied without costs — 9/30/75.

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Supreme Court, U. S.
FILED
FEB 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-9461

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT No. 8.

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED.

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

MOTION TO DISMISS ON BEHALF OF MADISON TEACHERS INCORPORATED.

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MADISON TEACHERS INCORPORATED

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. _____

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT No. 8.

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED.

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

MOTION TO DISMISS ON BEHALF OF MADISON TEACHERS INCORPORATED.

QUESTION PRESENTED

WHETHER A STATE, IN FURTHERANCE OF ITS LABOR POLICY OF RECOGNIZING THE PRINCIPAL OF EXCLUSIVE REPRESENTATION, MAY PROHIBIT CONDUCT BY A PUBLIC EMPLOYER (SCHOOL BOARD) WHICH CULMINATES IN SAID SCHOOL BOARD PERMITTING A REPRESENTATIVE OF A DISSIDENT MINORITY IN ITS BARGAINING UNIT TO SPEAK AND PRESENT AN EMPLOYEE PETITION ON A MANDATORY SUBJECT OF BARGAINING, THEN UNDER NEGOTIATION, AT A PUBLIC MEETING OF SAID SCHOOL BOARD.

STATEMENT OF THE CASE

The appellants (hereafter referred to as the school board, board or employer) and Madison Teachers, Inc. (hereafter referred to as MTI or union) were parties to a collective bargaining agreement covering teachers, among others. The agreement ran from January 1, 1971 to December 31, 1971. (Hereafter, all dates refer to the year 1971 unless expressly indicated otherwise.)

On January 25 the union submitted a proposal for a new contract to take effect January 1, 1972. This proposal contained a "fair-share" provision, i.e., a contractual requirement that all teachers join MTI or pay a proportionate share of the collective bargaining costs to MTI. (R. 39-40, 90). Fair-share was discussed throughout negotiations. (R. 51-54). The school board initially objected to fair-share on the ground that it was not authorized by law. (R. 53). Several times it urged the union to defer the fair-share proposal for another year. (R. 54). On October 4, MTI submitted a revised fair-share proposal contingent on passage of enabling legislation. The board's representatives rejected this proposal as "permissive". (R. 53).

Enabling legislation became effective November 11 by Chapter 124, Laws of 1971. On November 17 the union submitted its third fair-share proposal to conform with the new law. (R. 41, 52). By this time, however, thirteen unresolved issues crowded the bargaining table. Two of them loomed large: (1) fair-share, and (2) final and binding arbitration of teacher dismissals and nonrenewals. The employer had opposed both arbitration and fair-share throughout negotiations. On the other hand, one of its bargaining representatives indicated,

informally, that (a) fair-share possibly might be accepted by the board although arbitration of dismissals and nonrenewals could not possibly be accepted; (R. 91) and (b) two members of the board would approve fair-share if the union withdrew its arbitration proposal. (R. 73).

On November 14 teachers Holmquist and Reed sent a letter to all teachers which said, inter alia: "SAVE FREEDOM OF CHOICE/ A Closed Shop (Agency Shop) Removes This Freedom". (A-Ap. p. 141). The letter solicited responses, and two hundred were received. A meeting was set for December 2, and fourteen attended, half of whom were MTI members. A petition to defer fair-share was developed (A-Ap. p. 145) and was immediately distributed among teachers along with a "Points of Information" bulletin (A-Ap. p. 144) and a cover letter. (A-Ap. p. 142).

Employer agents knew of the Holmquist-Reed activity. On December 6, Reed, upon his request, was given permission by two school principals to circulate the petition among the teachers and to use the teachers' mailboxes for distribution of a letter. (R. 135-136). The letter urged deferral of fair-share. (A-Ap. p. 145). In addition to the principals' knowledge, MTI representative John Matthews specifically told board member Yelinek, only minutes before the board's regular December 6 meeting, that individuals other than MTI representatives reportedly intended to speak to the board on negotiable items. Furthermore, Matthews presented Yelinek with the language of the circuit court decision in Board of Sch. Directors of Milwaukee v. WERC (1969), 42 Wis. 2d 637, 647, 168 N.W. 2d 92, which restrains such speaking. To Matthews' query whether MTI should bring this matter to the

attention of the board, Yelinek said he (Yelinek) "would take care of it". (R. 42-43).

Still only minutes before the December 6 board meeting, Matthews met with Holmquist and Reed. He apprised them of the same circuit court decision. (R. 65-67). Matthews urged Holmquist and Reed not to make a presentation against fair-share "or we were going to lose the whole ballgame". (R. 73-74).

Nevertheless, at the portion of the meeting called "Public Appearances" Holmquist rose to speak. He had concluded that people were confused as to the meaning of fair-share. His aim was to defeat fair-share this time around. "***[M]y purpose was to end the confusion by deferral". (R. 126). He said to the board (R. 46, 47, 91, 118-119; see Commission's Finding of Fact #12 (A-Ap. pp. 137-138)):

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package."

He then read the petition:

> "To: Madison Board of Education, Madison Teachers Incorporated. We the undersigned ask that the fair-share proposal (agency shop)

being negotiated by Madison Teachers Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair share proposal. 4) The results of this written ballot be made public."

He added:

"We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the 'whole package' and therefore is not issue specific ... Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it. For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation."

School board president, Mrs. Doyle, asked whether Holmquist intended to communicate the petitions to the board, and Holmquist responded affirmatively. (R. 47, 48, 119).

MTI feared Holmquist's action was:

> "*** the most damaging thing to our strategy that had occurred in the last two years. *** [I]t undermined the strategy we were attempting. It hurt us drastically" (R. 92).

The board repaired to executive session. It passed a resolution which said: (R. 49, 155)

> "It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and not including agency shop: if the MTI does not accept this as a total package the offer of arbitration is withdrawn." (Emphasis the board's.)

Negotiations resumed the next day. The board had a new team. Superintendent Ritchie opened the meeting by presenting the above-quoted board resolution and saying "This is the deal" (R. 48-49). MTI conceded.

> "We decided *** that was the best we were going to get in view of the motion that was passed by the board the night before" (R. 75).

The union filed a complaint with the Wisconsin Employment Relations Commission (hereafter referred to as commission) on January 6, 1972, alleging that the employer had committed prohibited

practices in violation of sec. 111.70(3)(a)1. and 4., Stats. On September 13, 1972, the commission concluded the employer had committed such practices and ordered that the employer (A-Ap.pp. 140-141):

> "Shall immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc."

The employer petitioned the Dane County Circuit Court for review under ch. 227, Stats. MTI intervened. The circuit court entered its written decision on October 2, 1973 (A-Ap.pp. 126-131). Judgment affirming the commission and dismissing the petition for review was entered October 12, 1973. The employer appealed said decision to the Wisconsin Supreme Court. The Wisconsin Supreme Court affirmed the Dane County Circuit Court decision (A-Ap.pp. 101-115) and subsequently denied Appellant's Motion for Rehearing.

Stage and manner in which federal question was presented and decided below.

Prior to hearing, appellants made the following motion:

> "I also move to dismiss because, even assuming that everything occurred in the Complaint and is true, to deny a teacher the opportunity to speak at a public meeting would deny the teacher of her civil rights as guaranteed by the U.S. Constitution, the Wisconsin Constitution and Section 111.70." (Record Page 35).

Clearly, the appellant, from the very beginning of this case, was asserting the constitutional rights of Albert Holmquist and not constitutional rights that the Appellant had any standing to assert. The entire record reflects a failure by the appellant to distinguish between the rights of Albert Holmquist or teachers in general and the appellant.

ARGUMENT

This case does not fall within the appeal jurisdiction of the United States Supreme Court and is not otherwise appropriate for consideration by the Court.

A. The appellants never drew into question the validity of any state statute.

This case commenced with the filing of a prohibited labor practice complaint with the Wisconsin Employment Relations Commission by Madison Teachers Inc. The complaint alleged prohibited practices by the appellants on the basis that the Board of Education permitted a representative of a dissident minority in its bargaining unit to appear at a public meeting of the Board and to speak to the Board in regard to a mandatory subject of bargaining then under negotiation. It was and is the contention of Madison Teachers Inc. that the circumstances surrounding Mr. Holmquist's statements to the Board of Education constituted "negotiating" or "bargaining" with someone other than the exclusive collective bargaining agent.

In their answer to the complaint, the appellants contended that Holmquist's remarks made at the Board meeting "involved solely the giving of a position statement at an ordinary meeting of a public

body and thus cannot be labeled as negotiating." (A-Ap. pp. 148-149). All parties agree that it is the duty of the appellants to bargain exclusively with Madison Teachers Inc. (A. brief pp. 12-13; A-Ap. p. 155).

The Dane County Circuit Court stated:

> "The crux of this case thus reduces to whether Holmquist's 'statement' before the board constituted 'negotiation' or was merely the giving of a 'position statement.' " (A-Ap. p. 130).

The Wisconsin Supreme Court expressed a similar view (A-Ap. p. 111). The Wisconsin Employment Relations Commission, the Dane County Circuit Court and the Wisconsin Supreme Court all concluded that the facts in this case support the conclusion that Holmquist's statement constituted "bargaining" or "negotiating". The Supreme Court concluded:

> "Even though Holmquist's statement superficially appears to be merely a 'position statement', the court deems from the total circumstances that it constituted 'negotiating'." (A-Ap. p. 113).

The Court had previously stated that a mere position statement at an ordinary meeting of a public body would not constitute negotiating (Board of Sch. Directors of Milwaukee v. WERC, 42 W 2d 637, 652; 168 N.W. 2d 92 (1969); A-Ap. p. 113). The fact is that Mr. Holmquist did not speak to the Board of Education as a taxpayer/citizen. He spoke explicitly in the capacity of a representative of a dissident group of 72 bargaining unit teachers. His speech in that capacity, on a mandatory subject of bargaining then being bargained, is not a

mere position statement, especially when viewed in the context of the total circumstances.

It is the above judicial determination (that Holmquist's statement constituted bargaining) that is being challenged in this case -- not the constitutionality of any statute (see A. brief 12-13). Close scrutiny of the appellant's brief at pp. 12-13 reveals that the appellants are really challenging the constitutionality of the Wisconsin Courts' finding of fact characterizing Holmquist's statement as "bargaining" or "negotiating".

The decision of the Wisconsin Employment Relations Commission does not come within the meaning of the phrase "statute of any states" and does not constitute legislative action or possess legislative characteristics within the meaning of Lathrop v. Donohue, 367 U.S. 820 (1960). The Wisconsin Employment Relations Commission decision is judicial in nature; it is a decision which holds that the appellants committed an unfair labor practice under a particular set of facts. It has no general applicability to all public bodies as contended by the appellants (brief p. 8). In Allen-Bradley Local No. 1111 etc. v. Wisconsin Employment Relations Board et al., 237 Wis. 164, 295 N.W. 791, the Court stated that the Wisconsin Employment Peace Act "affects the rights of parties to a controversy pending before the Board only in the manner and to the extent prescribed by the Order."

B. The appellants lack standing.

Whether an appellant has standing to challenge a state statute in the U.S. Supreme Court is a separate issue to which the Court must bring its independent judgment. Cramp v. Board of Public

Instruction of Orange County, Florida, 368 US 278 (1961). It is respectfully submitted that the appellants herein lack standing.

Officials in their official capacities do not have standing to challenge the constitutionality of their state's own laws. Smith v. Indiana, 191 U.S. 138 (1903) held that a personal interest rather than a mere official interest is necessary to assert constitutional rights in opposition to a state court ruling. The appellant must show a personal deprivation of Federal constitutional rights to properly challenge state law. Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op, 276 US 71 (1928). The appellants herein have asserted no personal constitutional rights or claims. The school board alleges a "personal" stake in the outcome of this case on the basis that it is "duty bound to respect the constitutional rights of the general public and its teacher employees' citing Board of Education v. Allen, 392 US 236 (1968) and Pickering v. Board of Education, 391 US 563 (1968). Neither of these cases is supportive of appellant's position, especially on the question of jurisdiction. The Board of Education v. Allen case involved a refusal of the Board of Education to implement a law it believed to be unconstitutional and the board members consequently faced expulsion from office, while their school district faced a loss of state funds. In Pickering, the appellant was personally injured when the school board dismissed the appellant for publicly commenting on school matters. The instant case contains no equivalent personal stake on the part of the appellants which can serve as a basis for jurisdiction.

Furthermore, appellant's assertion that they fear personal liability is unwarranted and at best

extremely remote and speculative. No one has in fact been injured. In Sierra Club v. Morton, 405 U.S. 727 (1972) the court enunciated the injury in fact test. The party seeking review must demonstrate injury to a cognizable interest that he/she has suffered. One simply has no standing to litigate an issue unless "he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement." Doremus v. Board of Education, 342 U.S. 429, 434 (1952); Cramp v. Board of Public Instruction of Orange County, Florida, supra; Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 488.

Appellants claim standing to assert the constitutional rights of its teacher employees, despite long established authority to the contrary. Appellant argue that the "need to protect fundamental rights ... will prompt courts on grounds of broad constitutional policy to proceed without blind adherence to technical rules of representation" (brief, p. 10) and cite Barrows v. Jackson, 346 U.S. 249 (1953) and Smith v. Board of Education 365 F (2d) 770 (8th Cir. 1966) as authority for said proposition. In Barrows the Court found the appellant to have a real financial interest that provided a basis for standing to assert the constitutional issues presented by that case. In Smith, the appellant was a member of the class for which fundamental rights were being asserted. Smith was actually injured under the law challenged as unconstitutional. The appellants herein do not have standing to protest constitutional infringements, if any, suffered by their teacher employees.

*** Appellee has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1972).

Neither Holmquist, nor anyone else has suffered injury in fact and the appellants lack standing to seek relief for injuries which are not their own.

Appellants' brief grossly distorts the Wisconsin Supreme Court Decision (brief pp. 11-12). The Wisconsin Supreme Court does not require " ... boards of education to refuse to permit certain teacher employees the opportunity to speak and petition at regular public meetings." (brief pp. 11-12). Accurately stated, the Wisconsin Supreme Court merely held that under the Wisconsin Municipal Employment Relations Act, certified majority bargaining agents have exclusive negotiating rights with the employer. Holmquist or any other public employee can speak and petition to their heart's content so long as they do not intrude upon the collective bargaining or negotiating prerogatives of the exclusive majority bargaining agent. The Court properly declined to reverse the finding of fact that Holmquist's conduct constituted bargaining. The issue is the exclusivity of the collective bargaining function -- a policy that has been subjected to the scrutiny of this Court and found to be constitutionally permissible. See Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-685 (1944); and the very recent case of the Emporium Capwell Co. v. Western Addition Community Organization, 420 US 50 (1975). Certainly the same labor relations policies that are endorsed on the federal level cannot be deemed constitutionally impermissible when adopted by the states. The Wisconsin Supreme Court stated in its decision: "The principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts." (A-Ap.p. 110.) This narrow restriction is constitutionally permissible. Such a policy has been endorsed by the federal government and the State

of Wisconsin " ... to avoid the dangers attendant upon relative chaos in labor-management relations." (A-Ap. p. 111).

C. This case is not ripe and concrete for adjudication.

This Court has limited its jurisdiction to actual cases and controversies. In United Public Workers v. Mitchell, 330 U.S. 75 (1947) the Court stated:

> "Should the courts seek to expand this power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories."

In United Public Workers the Court held that appellants could not challenge the constitutionality of the Hatch Act without a showing of injury in fact.

In International Longshoreman's Warehouseman's Union v. Boyd, 347 US 222 (1954), the Court refused to rule on the applicability of a statute that had not yet been applied to appellants.

In the present case, the ruling being challenged has not yet in fact been applied to anyone. Holmquist, in fact, was not prevented from speaking. The effect and validity of the challenged ruling on "future activities of every public body in Wisconsin" (brief p. 13) remains to be seen and judged if and when the occasion presents itself. In the meantime, the consideration of the constitutionality of such potential application by public bodies is premature and speculative.

In Allen-Bradley Local No. 1111, etc., v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942), the Court stated at p. 746:

> We deal, however, not with the theoretical disputes but with concrete and specific issues raised by actual cases. (cases cited). Constitutional questions are not to be dealt with abstractly (cases cited). They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us (cases cited). Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the Federal Constitution or an Act of Congress (cases cited).

D. There is no substantial federal question.

The Appellee does not challenge the importance of First Amendment Rights; it asserts however that none are at stake in this case. Neither Holmquist nor anyone else has in fact been prevented from exercising any first amendment right. The only real issue is whether Holmquist's statement has properly been characterized by Wisconsin authorities as "bargaining" or "negotiating" (see A. brief, pp. 12-13). It is clear that such a factual determination is strictly within the purview of the State, especially where such finding is made pursuant to interpretation of a state statute and does not have actual impact on any federal right. See Allen Bradley Local No. 1111, etc., v. Wisconsin Employment Relations Board, supra.

Appellants display much ambiguity as to exactly what rights are being asserted in this appeal. The Appellants state:

> The Appellants have conceded that speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to the exclusive representatives of a bargaining unit. (A. brief pp. 12-13).

Having conceded the above, however, the appellants argue that the present case does not involve bargaining because the employer only listened to but did not confer with someone other than the exclusive bargaining agent. It is unclear whether appellants are seeking to vindicate the Employer's conduct from being labeled as an unfair labor practice or whether the Appellants are asserting that someone whose interests they have standing to assert, has in fact been deprived of first amendment rights. Appellants' concession, when considered in conjunction with the appellants' assertion that first amendment rights have been violated in this case amounts to a novel and unfounded interpretation of first amendment rights. The appellants actually argue that Holmquist's statements were protected by the First Amendment, but if the School Board had responded to Holmquist (conferred with him) then his same statement could be constitutionally restricted. Certainly, whether an actual settlement or agreement is ultimately reached does not determine whether bargaining has transpired. Whether the appellants continued to negotiate with the exclusive representative is also irrelevant. Exclusivity is the issue. Medo, supra, and Emporium Capwell, supra, demonstrate a long standing and thorough endorsement of the validity of the principle of exclusive representation in the area of labor relations and the importance attributed to said principle by the Court. Emporium Capwell, supra, is an example where this Court found unilateral action by bargaining unit members to be properly restricted on the basis of the principle of exclusive representation. Certainly the concurrence of Wisconsin with this federally recognized principle is clearly permissible. The fact that this important labor policy is being applied to a public employer is no basis for distinction. There

is no constitutional requirement to accord public employers or dissident public employees the freedom to maim the collective bargaining process by repudiating or undermining the exclusivity of a certified majority bargaining representative. The guise of preserving free speech rights does not provide conduct that undermines the policy of exclusivity of representation in the field of labor relations with the umbrella of constitutional protection, the employer's interests to the contrary notwithstanding. There is no real significance to the question of whether the determination by Wisconsin authorities that Holmquist's statement to the Board of Education on December 6, 1971 constituted bargaining is supported by the evidence. It has not been asserted or demonstrated that Holmquist's statement or the decision that followed in its aftermath have resulted in any actual intrusion on anyone's First Amendment rights, including those of the appellants herein.

CONCLUSION

The constitutionality of a state statute has not been properly drawn into question. There has been no actual infringement of any federal constitutional right. The appellants do not have sufficient personal stake nor do they assert any actual harm or injury by the order sought to be reviewed. There is no justiciable issue. There is no substantial federal question. Accordingly, the Appellee moves for dismissal of this appeal for want of jurisdiction. In the alternative, since the principle enunciated and endorsed by the Wisconsin Supreme Court is so

clearly and firmly established in the law, the appellee moves for affirmance of the judgment below.

Respectfully submitted

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT No. 8,

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT No. 8,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court (A. P. 179) is reported officially at 69 Wis. 2d 200, and unofficially at 231 N.W. 2d 206 and 89 LRRM 2929. The Wisconsin Circuit Court's opinion affirming the Order of the Wisconsin Employment Relations Commission (hereinafter WERC) (A. P. 171) is not reported. The findings of fact, conclusions of law, order and memorandum accompanying findings of fact, conclusions of law and order of the WERC are not officially reported. (A. P. 124)

JURISDICTION

The judgment of the Wisconsin Supreme Court was entered June 30, 1975. An order denying rehearing was issued September 30, 1975 (A. P. 207). The notice of appeal to the United States Supreme Court was filed December 5, 1975. Appellants' request for extension of time to docket appeal was granted December 24, 1975. Appellants' Jurisdictional Statement was filed January 5, 1976. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (2). This Court noted probable jurisdiction March 1, 1976.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I of the Amendments to the Constitution of the United States provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of Article XIV of the Amendments to the Constitution of the United States provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein They reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any personwithin its jurisdiction the equal protection of the laws."

WISCONSIN STATUTES INVOLVED

1 Wisconsin Statutes, Sec. 111.70 (2), p. 2143 (1971), provides:

> (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement. Such fair-share agreement shall be subject to the right of the municipal employer or a labor organization to petition the commission to conduct a referendum. Such petition must be supported by proof that at least 30% of the employes in the collective bargaining unit desire that the fair-share agreement be terminated. Upon so finding, the commission shall conduct a referendum. If the continuation of the agreement is not supported by at least the majority of the eligible employes, it shall be deemed terminated. The commission shall declare any fair-share agreement suspended upon such conditions and for such time as the commission decides whenever it finds that the labor organization involved has refused on the basis of race, color, creed or sex to receive as a member any employe of the municipal employer in the bargaining unit involved, and such agreement shall be made subject to this duty of the commission. Any of the parties to such agreement or any municipal employe covered thereby may come before the commission, as provided in s. 111.07, and ask the performance of this duty.

1 Wisconsin Statutes Sec. 111.70 (3) (a) 1 and 4, p. 2143 (1971), provides:

> (3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:
>
> 1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).
>
> * * *
>
> 4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

Additional relevant statutes are printed in the Appendix to this Brief (hereinafter B. A. P. _____). 29 USC 141 (B.A.P. 1) 29 USC 157 (B. A. P. 1, 2) 29 USC 158 (B. A. P. 2-8) 29 USC 159 (B. A. P. 8-10) 111.70 (1) (a) (b) (c) (d) (h) (j) (k) (m) (n) (B.A.P. 10-12) 111.70 (3) (B.A.P. 12-15) 111.70 (4) (a), (b), (d) 1,2 (B.A.P. 15-17).

QUESTION PRESENTED

Whether a state labor statute may constitutionally require that a duly elected board of education refuse to permit teacher employees other than representatives of the certified bargaining representative the opportunity to appear, speak and present a petition to the board at a regular board meeting during the portion of the meeting devoted to public appearances when the appearance, speech and petition relate to matters subject to collective bargaining.

STATEMENT OF CASE

The Appellant, City of Madison, Joint School District No. 8, et al, operates the school system of said City and has its principal office at 545 West Dayton Street, Madison, Wisconsin. The Board of Education of the District is an agent of the District and is charged with the possession, care, control and management of the property and affairs of the District. (A. P. 125) The Board of Education is composed of seven (7) members, elected on a rotating basis for three year terms.

The Appellee, Wisconsin Employment Relations Commission, is an administrative body charged with the responsibility of administering statutory policy with respect to public and private employer-employee relations. §111.70 *Wis. Stats.* (1971)

The Appellee, Madison Teachers Incorporated, is a labor organization and the exclusive collective bargaining representative of the teachers of the District (A.P. 125, 126).

The Board of Education, hereinafter "Board", and Madison Teachers Incorporated, hereinafter "MTI", have entered into a series of collective bargaining agreements covering wages, hours and conditions of employment for bargaining unit personnel since 1966. (A. P. 126) The agreement, having a term commencing January 1, 1971, and ending December 31, 1971, included among its provisions the following in Article IIA entitled Conference and Negotiation:

> 2. (d) If matters which are proper subjects of negotiations are brought, whether in the form of a grievance, petition or otherwise, to the attention of either of the parties to this agreement by any individual, group of individuals or organization other than the other party to this agreement or its duly authorized agents, such latter party shall be punctually informed of such action." (A. P. 126-27)

Negotiations between the Board and MTI for a successor agreement began on or about January 21, 1971. (A. P. 127) The negotiations between the parties included discussion of inclusion of a "fair share" agreement in the 1972 collective bargaining agreement. (A. P. 127)

The Wisconsin Statutes dealing with municipal employment labor relations were significantly amended effective November 11th by Chapter 124, Laws of 1971. The amendments were patterned after the National Labor Relations Act. The amendments imposed a duty to bargain on Wisconsin municipal employers. (Brief Appendix hereinafter (B. A. P. 10-17) The amendments also permitted

municipal employers and the majority representative of its employees to enter into a "fair share" agreement as defined by Section 111.70 (1) (h) *Wis. Stats.* 1971. (B.A.P. 11) MTI submitted a "fair share" proposal which conformed with the Statutes on November 17, 1971. (A. P. 128)

The number of unresolved issues between the two parties had been reduced to approximately thirteen (13) by November of 1971. Among the major unresolved issues were "fair share" and binding arbitration of non-renewal of teacher contracts and teacher dismissals. (A. P. 128)

In November, 1971, Ralph K. Reed and Albert Holmquist, teachers employed by the District, neither of whom were members of MTI, drafted a letter concerning fair share. (A. P. 129, 135) They mailed the letter on November 14, 1971 to all teachers employed by the District. (A. P. 129) They received approximately 200 replies to the letter, the majority of which were favorable to their position on fair share. (A. P. 129)

Mr. Reed and Mr. Holmquist called a meeting of those teachers who indicated they would work actively against any "fair share" proposal. (A. P. 129) The meeting was held on December 2, 1971. (A. P. 129) The group prepared a petition and an accompanying letter. (A. P. 129, 136-140) They also formulated plans for circulation of the documents in the schools December 6, 1971. (A. P. 129) They wished to present the results of the survey to Madison Teachers Incorporated and the Board of Education on the evening of December 6, 1971. (A. P. 137)

The petition was circulated in the schools in non-working areas on non-working time with the knowledge of at least two principals. (A. P. 129, 182) Mr. Reed also

distributed a letter to teachers of Van Hise Middle and Elementary Schools through use of teacher mail boxes. (A. P. 129, 140-141)

A regular meeting of the Board of Education was scheduled for the evening of December 6, 1971. (A. P. 130) The officers and representatives of MTI were present at the meeting. (A. P. 130) Just prior to the Board meeting, John Matthews, the Executive Director of MTI, met Board member Yelinek in the School Board parking lot. Mr. Matthews informed Mr. Yelinek that Albert Holmquist would attempt to speak to the Board during the public appearance portion of the meeting. Mr. Yelinek told Mr. Matthews he would take care of it. (A. P. 183)

A portion of each regular meeting is devoted to public appearances. (A. P. 130) A number of individuals were allowed to speak to the Board that evening. (A. P. 130, R. P. 141) The president of MTI was allowed to speak. (A. P. 130) At the conclusion of his remarks he presented to the board a statement containing the signatures of between 1300 and 1400 teachers setting forth that: "We, the undersigned, wish the parties to resume negotiations and reach agreement as quickly as possible." (A. P. 130)

Albert Holmquist also completed a registration form indicating that he wished to speak to the Board of Education. (A. P. 97) He did not indicate what he wished to speak about on the form. (A. P. 98) Mr. Holmquist was permitted to speak after the president of MTI. Mr. Holmquist commenced his remarks as follows:

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education,

> as I already have the Madison Teachers Incorporated. about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package." (A. P. 130)

He then read the text of the petition that had been circulated among the teachers of the District dated December 6, 1971.

> To: Madison Board of Education, Madison Teachers Incorporated. We, the undersigned, ask that the fair-share proposal (Agency shop) being negotiated by the Madison Teachers Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal. 4) The results of this written ballot be made public.
>
> We feel this study necessary because neither the Board's negotiators who have placed entirely too much emphasis on this point, nor Madison Teachers Incorporated which speaks euphemistically about the "whole package" and therefore is not issue specific... Neither have properly addressed the serious issue of fair share and agency shop. We find much confusion in the proposal as it stands and even more on the part of the teachers' interpretations of it. For evidence, 417 teachers from 31 schools which represents 53% of the total number of these facilities of these schools ... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented

clearly to all teachers, and more importantly to the general public to whom we all are responsible. We ask simply for communication, not confrontation." (A. P. 130-31)

At the conclusion of Mr. Holmquist's remarks, Mrs. Doyle, the president of the Board of Education asked Holmquist, "Do you intend to communicate these petitions to the Board when you have them?" Holmquist replied in the affirmative. (A. P. 131)

No other member of the Board of Education spoke to Mr. Holmquist on the matter. (A. P. 131)

After the regular meeting, the Board of Education went into executive session and discussed the unresolved collective bargaining issues. (A. P. 131-32) A negotiation session had been scheduled for December 7, 1971. (A. P. 132) The board adopted the following resolution after their discussion:

> "It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and not including agency shop; if the MTI does *not* accept this as a total package, the offer of arbitration is withdrawn." (A. P. 132)

Negotiations between the Superintendent and Assistant Superintendent of Schools and the president and executive secretary of MTI continued as previously scheduled on December 7, 1971. (A. P. 132) The representatives of MTI were given the resolution adopted by the Board. Discussions concerning the Board's position and "fair share" took place during the meeting. (A. P. 132) In the afternoon of that day the parties reached tentative agreement upon MTI accepting the Board's proposal. (A.

P. 132) The tentative agreement was accepted as the agreement by both parties on December 14, 1971. (A. P. 132)

On January 6, 1972, Madison Teachers Incorporated filed a complaint with the Wisconsin Employment Relations Commission (hereinafter WERC) alleging that the Board of Education committed a prohibited labor practice when it listened to Mr. Holmquist at its meeting on December 6, 1971. (A. P. 3-7) The Board of Education denied the allegation and raised several affirmative defenses. (A. P. 7-9, 10) A hearing on the complaint was conducted by the WERC on February 28, 1972. (A.P. 9) The WERC issued its findings of fact, conclusions of law, order and memorandum accompanying findings of fact and conclusions of law and order on September 13, 1972. (A. P. 165) The WERC determined that the petitioners violated their duty to bargain in good faith with Madison Teachers Incorporated when the Board listened to Mr. Holmquist and thereby committed a prohibited labor practice in violation of Sections 111.70 (3) (a) 1. and 4. of the Wisconsin Municipal Employment Relations Act. (A.P. 133). The WERC ordered the Board to immediately cease and desist from permitting employees other than the representatives of MTI to appear and speak at meetings of the Board of Education on matters subject to collective bargaining between Madison Teachers Incorporated and the Board. A petition seeking review of the decision of WERC was filed October 13, 1972, in the Circuit Court of Dane County (A. P. 134).

The Circuit Court affirmed the findings and order of the WERC (A. P. 178). The Court concluded: "... that denying a representative of a minority of the bargaining

unit employees the right to appear at a public meeting of the Board and to speak to the Board on mandatory subjects of bargaining does not infringe upon the right of freedom of expression or the right to petition one's government as guaranteed by the Wisconsin and United States Constitutions." (A. P. 175).

The Board appealed to the Wisconsin Supreme Court November 9, 1973.

The Wisconsin Supreme Court delivered its opinion June 30, 1975. Justice Day, writing for the majority, indicated the basic question in the case was whether the activities of the Board at its public meeting constituted bargaining with other than the exclusive representative of the Board's teacher employees. He reasoned that the Board negotiated with an individual other than the exclusive representative of its teachers since it permitted Mr. Holmquist to influence the decision of the Board on a matter subject to collective bargaining. (A. P. 193). Justice Day concluded that the infringement upon the freedom to speak and petition permitted by the WERC and Circuit Court Orders was within the limits imposed on the restriction of those rights by United States Supreme Court decisions. (A. P. 189). Three justices dissented from the majority decision on Constitutional grounds. (A. P. 206).

The Board's motion for rehearing was denied September 30, 1975. (A. P. 207).

On March 1, 1976 this Court noted probable jurisdiction of the School Board's appeal from the Wisconsin Supreme Court.

SUMMARY OF ARGUMENT

I.

This case presents the issue of the degree to which First Amendment rights to speak and petition one's government may be abridged in the alleged pursuit of stable, peaceful and orderly labor relations in the public sector.

A. The critical importance of the rights guaranteed by the First Amendment to the vitality of a democratic system of government is unquestioned. This Court has consistently recognized and reaffirmed the importance of maintaining a system of free expression. The Court has insisted that statutes punishing the use of words be carefully drawn and/or authoritatively construed to punish only unprotected speech and must not be susceptible of application to protected expression. Prior restraints of pure speech activity are highly scrutinized since content control undercuts our commitment to open uninhibited debate on public issues.

Overbroad and vague regulations of speech activity are also constitutionally defective since they are incompatible with the maintenance of our system of self-government.

This Court has only sanctioned restrictions on the exercise of the liberties guaranteed by the First Amendment in extraordinary circumstances.

This Court has also reminded school boards of their commitment to promote and maintain a system of freedom of expression when dealing with students and employees.

In fact, recently this Court held that failure to recognize and respect the constitutional rights of individuals may result in personal liability to board of education members.

B. The principle of majority rule is the cornerstone of federal labor management relations statutes. This principle underlies an employee's statutory right to join, form and assist any labor organization or refrain from any such activity. Should a majority of employees in an appropriate unit join a labor organization, and it is certified as the exclusive representative, the employer is obligated to engage in collective bargaining with the exclusive representative. Thus, the exercise of the statutory option to establish a collective bargaining relationship merely replaces the employer's former privilege of bargaining with individuals or groups of individuals.

The Congress and this Court have recognized the importance of the "majority rule" principle to the vitality of industrial democracy in private sector labor relations and also the importance of limiting the scope of its application because of its potential impact on individual rights. The labor statutes therefore protect the right of all employees to communicate with their employers and the right of employees to communicate between themselves about their exclusive representative. The importance of these individual interests has also been confirmed by this Court.

The Wisconsin legislature enacted a municipal employment labor relations statute based on the Federal private sector model in 1971. Thus, the "majority rule" principle has been transferred to public sector employment. The Wisconsin Supreme Court has decided three cases

involving the scope of the majority rule principle in public sector labor relations. The Wisconsin Supreme Court has interpreted the "majority rule" principle which obligates employers to bargain solely with the exclusive representative of their employees as mandating that school boards at public meetings refuse to listen to teachers other than representatives of the exclusive bargaining representative on matters subject to collective bargaining. The basis of these holdings rests on the assumption that listening to teachers other than representatives of the exclusive bargaining representative constitutes bargaining with that individual in derogation of the rights of the exclusive representative.

II.

The Wisconsin Supreme Court's reconciliation of First Amendment rights to freely speak and petition one's government, and the principle of majority rule in public sector labor relations, is heavily laden with constitutional infirmities.

A. The Court failed to recognize that the impact of adoption of majority rule on individual interests in public employment merely removes the former privilege of employers to bargain with employees individually. The restriction of bargaining to the exclusive representative clearly promotes stable, peaceful, and orderly labor management relationships. The court, however, equates mere listening with bargaining. This equation sanctions an impermissible intrusion on protected speech activities which is without basis even in private sector labor relations, let alone the public sector where employers have obligations to recognize and respect the constitutional

rights of their employees in addition to and superior to their obligations under the Municipal Employment Relations Act.

B. The Order of the Wisconsin Employment Relations Commission is also laden with constitutional difficulties. It obligates the school board to cease and desist from allowing certain teachers to speak at its public meetings on matters subject to collective bargaining. This Order imposes a prior restraint on pure speech activity in only one public forum based solely on content. It requires the school board to listen selectively on matters of public concern. This requirement of the Order is quickly recognized as abhorrent in a system founded on the unfettered interchange of ideas.

The Order is also overbroad and vague. It is overbroad in that it prevents mere *speaking* about instead of *bargaining* over matters subject to collective bargaining. It is vague in that it requires school boards to determine what are matters subject to collective bargaining. What subjects are within the term "conditions of employment"?

The Order is also defective since it requires the school board to depart from its constitutional obligation to handle access to its public forums in an evenhanded manner.

III.

A sound reconciliation of First Amendment liberties and the labor relations principle of "majority rule" in the public sector will at least provide that a public employer may always merely listen to any of its employees. This reconciliation has a firm foundation in labor law theory, and more importantly, reduces the possibility of an impermissible intrusion on our indispensable First Amendment liberties.

ARGUMENT

I

THIS CASE PRESENTS THE QUESTION OF THE EXTENT TO WHICH THE CONSTITUTIONAL RIGHTS OF INDIVIDUALS TO SPEAK AND PETITION THEIR GOVERNMENT MAY BE ABRIDGED IN THE NAME OF "MAJORITY RULE", THE STATUTORY CORNERSTONE OF LABOR-MANAGEMENT RELATIONS.

This case confronts the Court again with the duty our system places on the Court to say where an individual's freedom ends and the state's power begins. That decision is always delicate, but more so where the usual presumption supporting legislation, as interpreted, is balanced by the preferred place given in our scheme to the great and indispensible freedoms secured by the First Amendment. The crucial importance of First Amendment liberties gives them a sanctity and sanction not permitting dubious intrusions. *Thomas v. Collins* (1945), 323 U.S. 516 (rehearing denied 323 U.S. 819).

A. The Fundamental Freedoms Guaranteed By The First Amendment Are The Cornerstone Of Our Democratic System Of Government.

"The right of an individual to freedom of expression in our society as guaranteed by the First Amendment is an integral part of the great intellectual and social movement which transformed the Western world into a society whose faith rested upon the dignity, the reason and freedom of the individual." Emerson, *Toward a General Theory of the First Amendment*, Random House, p. 1 (1966).

The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. "Maintenance of a system of free expression is necessary (1), as a method of assuring individual self-fulfillment, (2), as a means of attaining the truth, (3), as a method of securing participation by the members of society in social, including political, decision making, and (4), as a means of maintaining the balance between stability and change in the society. Emerson, *supra*, p. 1.

The third function of a system of freedom of expression is to provide for participation in decision making through a process of open discussion, which is available to all members of the community. The right of all members of society to form their own beliefs and communicate them freely to others must be regarded as an essential principle of a democratically organized society. The crucial point, however, is not that freedom of expression is politically useful, but that it is indispensible to the operation of a

democratic form of government. "Once one accepts the premise of the Declaration of Independence — that governments derive their just powers from the consent of the governed — it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment." Emerson, *supra*, p. 10.

1. This Court has recognized the critical importance of preserving a system of free expression in order to insure the vitality of our system of self-government.

This Court has embraced the precepts of the traditional theory of freedom of expression. It has confirmed that the Constitutional protections of speech and petition were fashioned to insure unfettered interchange of ideas. *New York Times v. Sullivan* (1964), 376 U.S. 254. Freedom of speech lies at the foundation of a free society. *Shelton v. Tucker* (1960), 364 U.S. 479, and is the essence of self-government. *Garrison v. Louisiana* (1964), 379 U.S. 64. It has therefore been this Court's position to allow the widest room for discussion and the narrowest range for restriction, particularly when the right is exercised in conjunction with peaceable assembly.

This Court has also insisted that statutes punishing the use of words must be carefully drawn and authoritatively construed to punish only unprotected speech and must not be susceptible of application to protected expresssion. *Goodling v. Wilson* (1972), 405 U.S. 518.

Further, any system of prior restraint against expression bears a heavy burden against its constitutional validity. *United States v. Washington Post Co.* (1971), 403 U.S. 713. The essence of forbidden censorship is content control. This Court has refused to abide any restriction on expressive activity because of its content on the basis that such would undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open. *Police Dept., City of Chicago v. Mosley* (1972), 408 U.S. 92.

Finally, this Court has declared, consistent with traditional theory of freedom of expression, that even where regulation serves a substantial governmental interest, the regulation must do so in a manner consistent with the equal protection clause. There is an equality of status in the field of ideas, and once a public forum is provided, the government must afford all points of view an equal opportunity to be heard. *Mosley*, 408 U.S. 92, 99.

The attainment of freedom of expression, however, is not the only aim of a good society. It is a basic element in the democratic way of life and as a vital process, it shapes and determines the ends of a democratic society. But it is not through this process alone that a democratic society attains its ultimate goal. Emerson, *supra*, p. 47. The United States Supreme Court, as above noted, has consistently recognized and reaffirmed the preferred place of the First Amendment freedoms in our democratic scheme. The Court is also vested with the delicate job of reconciling freedom of expression with the other values and objectives sought by our society.

The Wisconsin Supreme Court approached the reconciliation required by this case in the following manner.

> "What is required to overcome the constitutional prescriptions on abridgement of First Amendment rights has been variously described as, 'a clear and present danger that (the speech) will bring about the substantive evils that '(the legislature) has a right to prevent.' *Schenk v. United States* (1919), 249 U.S. 47, 52. Or ...'grave and immediate danger to the interests which the state may lawfully protect.' *West Virginia State Board of Education v. Barnett* (1943), 319 U.S. 624, 639. Somewhat more recently, the Court has refined its language into a balancing test. 'In each case (courts) must ask whether the gravity of the evil discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' *Dennis v. United States* (1951), 341 U.S. 494, 510." 69 Wis. 2d 200, 212; 231 N.W. 2d 206, 212 (1975). (A. P. 189)

2. *The Wisconsin Supreme Court's approach to reconciliation of values required by the facts of this case is critical since school boards have a duty to recognize and respect the constitutional rights of their students and employees and failure to do so may result in personal liability.*

This Court has informed boards of education that students and teacher employees possess constitutional rights similar to the general citizenry and reminded boards of education of their obligation to respect those

rights. *Tinker v. Des Moines Independent School District* (1969), 393 U.S. 503; *Pickering v. Board of Education* (1968), 391 U.S. 563.

> "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights, they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public school in which they work, it proceeds on a premise that has been unequivocally rejected in prior decisions of this Court. ... It cannot be gainsaid that the state has interests as an employer in regulating the speech of its employees that differs significantly from those it possesses in connection with regulation of the citizenry in general." *Pickering* 391 U.S. at 568.

Furthermore, this Court recently held that members of boards of education who disregard the constitutional rights of individuals may be subject to personal liability. *Wood v. Strickland* (1975), 420 U.S. 308 (rehearing denied 421 U.S. 921).

Yet, the Wisconsin Supreme Court in deciding this case failed to consider the above precedents and their application to the facts of this case.

B. The Principle Of Majority Rule Is The Statutory Touchstone Of Labor-Management Relations.

The "majority rule" principle is basic to the collective bargaining approach to labor-management relations embodied in the Labor Management Relations Act. 29 USC §157, 29 USC §159a (1970). (B. A. P. 1, 2, 8, 9) The principle of "majority rule" is simply the statutory right of

a majority of employees through duly chosen "exclusive" representatives to govern on the employees' side of the employment relationship, not only for themselves but for individual employees and minority groups within an appropriate unit. This principle embodies the correlative duty of the employer to recognize this right in the "exclusive" representative chosen by the majority of his employees. Weyand, *Majority Rule in Collective Bargaining*, 45 Col. L. Rev. 556 (1945). See also Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers*, 123 U. Pa. L. Rev. 897 (1975). The selection of an "exclusive" collective bargaining representative by a majority of employees obligates the employer to bargain with that representative in respect to rates of pay, wages, hours of work, or other conditions of employment. 29 USC §159a (B. A. P. 8, 9) Further, this provision is coupled with the provision which specifies that it is an unfair labor practice for an employer to refuse to bargain collectively with the "exclusive" representative of his employees. 29 USC §158 (a) (1), (5). (B. A. P. 2, 3). These statutory duties and responsibilities are tempered by the right of any individual employee or group of employees to present grievances to their employer and the right of employees to join or assist any labor organization or refrain from doing so. 29 USC §159a, 29 USC §157. (B. A. P. 1, 2, 8, 9).

Thus, the nature of the collective bargaining relationship in the private sector turns upon *one*, the extent to which the term *"exclusive"* requires the employer to forego his former privilege of dealing directly with any individual employee or group of employees; *two*, the amount of the employer's business which the phrase "rates of pay, wages, hours of work or other conditions of

employment" requires him to include within his bargaining negotiations; and *three*, the character of the right preserved for the individual or group to join and assist, install or reject labor organizations, and present grievances to their employer. Weyand, *supra*, p. 559. Out of the answers to these questions emerges the structure of collective bargaining in the private sector of our economy.

Thus, "majority rule" replaces whatever rights an employer once had to bargain with individuals or groups by establishing a democratic procedure by which employees in an appropriate unit participate in making the decisions governing working conditions by voting as to which union shall represent them and by shaping the policies of that union through membership therein. Senator Wagner, who introduced the Senate bill which became the National Labor Relations Act, discussed "majority rule" on the floor of the Senate, stating:

> "Democracy in industry must be based on the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guarantee of political liberty that mankind has yet discovered." 79 Cong. Rec. 7571 (1935).

Further, Edwin E. Witte, Professor of Economics at the University of Wisconsin, in arguing that a "majority rule" provision must be included in the Wagner Act, explained the principle as follows:

> "In industrial government just as in political government, there has to be majority rule, when it comes to actual government... *the right to petition, the right to lay grievances before Congress, is a right that any individual, any group must have. Similarly, in an industrial government the right to petition, the right to lay grievances before the employer seems to me a right that every group should be accorded, and every individual,...* But if it comes to determining conditions of employment by making some kind of rules governing wages and hours, there obviously has to be determination on the basis of majority rule, or you have pure anarchy just as you would have in government." Hearings before Committee on Education and Labor on S. 2926, 73rd Cong., 2nd Sess. (1934) Pt. 1, p. 243. (Emphasis added).

The evidence is overwhelmingly clear that when a majority of employees in the private sector adopts a system of collective bargaining, the impact on individual employees goes no further than the removal of the former right of employees to bargain with their employer and the imposition of the duty on an employer to refrain from bargaining with any employee except the "exclusive" representative chosen by a majority of his employees.

1. *This Court has upheld the principle of majority rule in private sector labor relations.*

This Court conferred judicial sanction on the labor relations principle of majority rule in three early cases: *J. I. Case Co. v. NLRB* (1944), 321 U.S. 332; *Order of Railroad Telegraphers v. Railway Express Agency* (1944), 321 U.S. 342; and *Medo's Photo Supply Corp. v. NLRB* (1944), 321 U.S. 678.

In the more recent case *Vaca v. Sipes* (1967), 386 U.S. 171, the Court again made reference to the "majority rule" principle in labor relations when it stated:

"The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interest of all employees in a collective bargaining unit." *Vaca v. Sipes* 386 U.S. at 177.

This Court considered the extent to which the doctrine of "majority rule" subordinates the interests of individual employees in 1974. In *NLRB v. Magnavox* (1974), 415 U.S. 322 (rehearing denied, 416 U.S. 952), this Court held that the NLRB properly found that an employer violated the Labor Management Relations Act by maintaining a rule forbidding the distribution of literature in non-working areas during non-working time. Notwithstanding the exclusive representative's contractual waiver to any objections to the rule, the Court found that the place of work is a place uniquely appropriate for the dissemination of news concerning the bargaining representative and various options open to employees and so long as distribution is by employees to employees and so long as in-plant solicitation is on non-working time, banning of that solicitation seriously might dilute the rights of employees to form, join and assist labor organizations or to refrain from such activity.

Thus, the statutory labor relations principle of "majority rule" sanctioned by the Supreme Court is tempered by the rights of individuals to present grievances to their employer, and the right of employees to change their representative at appropriate times. It follows the labor relations "majority rule" principle was never intended to prevent communication between the employer and his employees, nor was it intended to insulate the "exclusive" representative from criticism even at so delicate a location as the work place.

2. *The labor relations principle of majority rule is embodied in the Wisconsin Municipal Employment Relations Act, Section 111.70* Wis. Stats. (1971).

The Wisconsin Municipal Employment Relations Act, §111.70 *Wis. Stats.* (1971) is patterned after the Federal private sector labor relations model. (B. A. P. 10-17) The Act guarantees the right of public employees to organize for the purpose of engaging in collective bargaining and also secures the right of employees to refrain from any and all such activity. §111.70(2) *Wis. Stats.* (1971). (Compare 29 U.S.C. §157. (B. A. P. 1, 2) It obligates a public employer to bargain with the "exclusive" representative of his employees in an appropriate bargaining unit. §111.70 (2), (4) (d) *Wis. Stats.* (1971). (B. A. P. 16, 17) (Compare 29 U.S.C. §157, (B. A. P. 1,2) 29 U.S.C. §159 (a) B. A. P. 8,9) A public employer will be found guilty of a prohibited labor practice if he refuses to bargain in good faith with the exclusive representative or interferes with the exercise of rights guaranteed by the act. §111.70 (3) (a) 1., 4. (1971). B. A. P. 12, 13, 14). (Compare 29 U.S.C. §159 (a) (B. A. P. 8, 9), 29 U.S.C. §158 (1) (a) (5) (B. A. P. 3) The statute also obligates the employer to bargain regarding matters of wages, hours and other conditions of employment. §111.70 (1) (d) (1971) (B. A. P. 11). (Compare 29 U.S.C. §159 (a) 1. (B. A. P. 8, 9). Finally, the Act preserves the right of public employees to present grievances to their employer. §111.70 (4) (d) (1971) (B. A. P. 16, 17). (Compare 29 U.S.C. §159 (a) (B. A. P. 8, 9).

3. The Wisconsin Supreme Court has decided three cases where it was called upon to apply the "majority rule" principle in public sector labor relations.

In *Board of School Directors v. WERC* (1969), 42 Wis. 2d 637, 168 N.W. 2d 92, the Wisconsin Supreme Court held *(reversing the WERC)* that a school board properly denied the representative of a minority union the right to speak at a public meeting of the school board on negotiable matters. The court found that the refusal to allow a minority union employee to speak was consistent with the Municipal Employment Relations Act and did not infringe upon his right of free speech as guaranteed by the Wisconsin Constitution. The Court in the *Milwaukee School Directors* case reasoned that had the board allowed the individual to speak, it would have permitted the individual to influence the board and thus the board would have negotiated with someone other than the exclusive representative of its employees. Interestingly enough, the court drew all of these conclusions based solely on a presumption since the individual was never allowed to say anything. Appeal beyond the Wisconsin Supreme Court was not sought in the *Milwaukee School Directors* case.

The Wisconsin Supreme Court had an opportunity to explain its *Milwaukee School Directors* holding in the case of *LaCrosse County Institution Employees v. WERC* (1971), 52 Wis. 2d 295, 190 N.W. 2d 204. In that case the court stated:

> "The essence of the *Board of School Directors* case was merely that, if a municipality sees fit to *bargain* it must do so with the certified representative of the employees and cannot negotiate with a minority union." (Emphasis added) *LaCrosse*, 52 Wis. 2d at 300, 190 N.W. 2d at 207.

The dispute at bar between the City of Madison Board of Education and MTI arose in the state judicial setting just described. The City of Madison Board of Education permitted a teacher other than the exclusive representative to speak on a negotiable subject at a regular public meeting during the portion of the meeting devoted to public appearances. The WERC, faced with the binding precedent of the *Milwaukee School Directors* case, found that the Board committed a prohibited labor practice. The WERC held that when the Board listened to the non-union teacher employee, it negotiated in derogation of the rights of the exclusive representative. Yet, the record clearly establishes that the Board merely listened to the teacher and received results of a petition circulated by the teacher. (A. P. 101, 102, 131)

The Board petitioned for review of the decision by the Dane County Circuit Court. The Circuit Court affirmed the order of the WERC following the precedent of the *Milwaukee School Directors* case. The Circuit Court reasoned as follows:

> "Even though Holmquist's statement superficially appears to be merely a position statement, this court deems from the total circumstances that it constituted 'negotiating'. The court in *Board of School Directors*, supra, at p. 635, stated: 'If the minority union representative is permitted to influence the decision of the school board by his argument, then he is truly 'negotiating'."

The Board appealed to the Wisconsin Supreme Court. The Board challenged the wisdom of the Circuit Court's judgment on constitutional as well as statutory grounds. Justice Day, writing for the majority of the Wisconsin Supreme Court, identified the question on appeal as:

> "Was it error for the Circuit Court to confirm the conclusion of the Wisconsin Employment Relations Commission that the school board committed a prohibited labor practice in that it 'negotiated' or 'bargained' with other than the exclusive bargaining representative of the teachers on matters subject to collective bargaining when it allowed a representative of a minority group of teachers to speak at a board meeting, listened to his statements and received the results of a petition circulated by that group — all concerning matters subject to collective bargaining — when this was done at a regular public meeting of the Board." *City of Madison v. WERC* (1975), 69 Wis. 2d 200 at 202, 231 N.W. 2d 206 at 208. (A. P. 179)

Later, Justice Day states:

> "... the question is whether the activity herein complained of by MTI ... qualifies as bargaining and can therefore be restricted under the rule of the *Board of School Directors v. WERC." City of Madison,* 69 Wis. 2d at 212, 231 N.W. 2d at 213. (A. P. 190)

The Court affirmed the circuit court judgment affirming the order of the WERC following the dubious precedent of the *Milwaukee School Directors* decision. The court held that the Board of Education negotiated with other than the exclusive representative when it permitted a non-union teacher to speak at a regular public meeting of the Board during a portion of the meeting devoted to public appearances. The court was concerned that the speech was about a negotiable subject, and was other than a position statement about the subject. The court felt that the

statement by the non-union teacher went to the very heart of negotiations. "We agree with the trial court that this was in fact negotiating.... The statement given by Mr. Holmquist was more than a mere statement of position; It was an argument for it." *City of Madison,* 69 Wis. 2d at 215, 231 N.W. 2d at 214. (A. P. 193). Simply, the court held that the Board of Education or any public body negotiates with other than the exclusive representative in derogation of its obligations under the Municipal Employment Relations Act if it permits employees to attempt to influence its decision covering a matter subject to collective bargaining at public meetings.

The court found no constitutional infirmity with its decision.

II.

THE WISCONSIN SUPREME COURT DECISION IN *CITY OF MADISON ET AL. v. WISCONSIN EMPLOYMENT RELATIONS COMMISSION AND MADISON TEACHERS INCORPORATED* MUST BE REVERSED IN THAT THE WISCONSIN COURT FAILED TO PROPERLY RECONCILE AN INDIVIDUAL'S CONSTITUTIONAL RIGHT TO SPEAK FREELY AND PETITION ONE'S GOVERNMENT AND THE CORRELATIVE DUTY OF THAT GOVERNMENT TO RECOGNIZE AND RESPECT THOSE RIGHTS WITH THE STATUTORY RIGHT OF "MAJORITY RULE" IN PUBLIC SECTOR LABOR RELATIONS.

The public sector labor relations environment differs significantly from the private sector labor relations environment in at least two critical ways. First, it is important to remember that the duties, obligations and responsibilities imposed by the United States Constitution on governmental bodies as employers are in addition to and superior to their statutory obligations as municipal employers. Second, the business decisions of governmental bodies are decisions concerning public

business made in a public decision-making framework. Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156 (1974). In Wisconsin, this aspect of the public decision-making environment is expressed in §66.77 (1) *Wis. Stats.* (1973).

> "... the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business." See also §65.90 *Wis. Stats.* (1973).

These aspects of the public employer decision-making framework also found expression in the rule of the City of Madison Board of Education that allows public appearances at each and every regular Board meeting (A. P. 130).

It is thus axiomatic that the duties imposed by §111.70 of the Wisconsin Statutes must be measured in the context of the rights granted and responsibilities imposed by the Constitution, and with an abiding concern for the special decision-making environment of which public bodies are a part.

The Wisconsin Supreme Court decision upholds an interpretation of the Wisconsin Municipal Employment Relations Act which disregards concern for the constitutional responsibilities of governmental employers and the special decision-making environment imposed on public employers. Under such circumstances, the statute, as interpreted, must fall.

A. The Wisconsin Supreme Court Decision Must Be Reversed In That The Court Seriously Misjudged The Scope Of First Amendment Infringement Allowable Pursuant To The Labor Relations Principle of "Majority Rule".

The City of Madison Board of Education concedes that speech in the form of bargaining or negotiating for a labor agreement at a public meeting can be constitutionally restricted to representatives of the majority bargaining unit. In our view such a limited restriction of free speech avoids the dangers of relative chaos in labor-management relations, promotes industrial peace and the improvement of wages, hours and working conditions by fostering a system of employee organizations and collective bargaining. *Schenk v. United States* (1919), 249 U.S. 47; *West Virginia State Board of Education v. Barnett* (1943), 319 U.S. 624; *Dennis v. United States* (1951), 341 U.S. 494.

However, the Board of Education has never conceded what Justice Day, writing for the Wisconsin Supreme Court majority, identified as the basic issue of the case.

> "... whether or not the activities of the Board at its public meeting constituted bargaining." *City of Madison*, 69 Wis. 2d at 209, 231 N.W. 2d at 211. (A. P. 187).

The Appellant has consistently maintained that labeling the activity engaged in by the Board of Education and Mr. Holmquist at its public meeting as "bargaining" and thus

a prohibited practice is, in the first instance, contrary to the facts; secondly, unsound labor relations law; and thirdly, and most importantly, unsound constitutional law.

> *1. The adoption of the majority rule principle merely sanctions the option of the establishment of a collective bargaining structure to replace the employers privilege of bargaining with any individual or group of employees.*

The Wisconsin Municipal Employment Relations Act sanctions the option of, and provides a method by which Wisconsin municipal employees may establish a collective bargaining relationship with their municipal employer. §111.70 *Wis. Stats.* (1971) (B. A. P. 10-17). If such an option is adopted by the employees in an appropriate unit, the employer is then obligated to collectively bargain with the representatives of that unit and refrain from bargaining with any other individual employee or group of employees regarding wages, hours and other conditions of employment. §111.70 (2), (4) (d) *Wis. Stats.* (1971) (B. A. P. 16, 17). Thus, "majority rule" merely replaces whatever rights an individual employee theretofore had to bargain individually by establishing a democratic procedure whereby he and his fellow workers in an appropriate unit participate in making decisions governing their working conditions by voting as to *which* union shall represent them and by shaping the policies of that union by membership therein. Weyand, *supra*, p. 561.

The doctrine of "majority rule" makes the individual employee a citizen in an industrial democracy. However, it must be remembered that the industrial democracy established by majority rule recognizes the importance of minority rights in maintaining the vitality of the industrial democracy. Just as the majority rule principle of political democracy recognizes individual rights, the Municipal Employment Relations Act preserves the right of individual employees to present grievances to their employer. §111.70 (4) (d) *Wis. Stats.* (1971) (B. A. P. 16, 17).

Further, the adoption of the "majority rule" principle was never intended to insulate the certified representative from criticism, challenge, or even repudiation by members of the collective bargaining unit. This Court recognized the importance of this aspect of the "majority rule" principle in the recent case of *Magnavox v. NLRB* (1974), 415 U.S. 322. (Rehearing Denied, 416 U.S. 952 (1974). In *Magnavox* the Court held that a certified representative could not contractually waive the rights of employees to distribute literature regarding the employer-employee relationship without seriously diluting the rights of employees to exercise the options granted by the labor law to freely choose who shall represent them or whether they shall be represented.

It is clear, therefore, that the replacement of individual bargaining by collective bargaining was never intended to totally restrict communication between the employer and his employees. Further, the "majority rule" theory recognizes the wisdom of promoting communication between employees to insure the vitality of the industrial democracy it establishes.

It is thus incumbent upon administrative and judicial bodies to precisely define the type of activity which constitutes bargaining since that definition will have impact on the vitality of the industrial democracy established by the acceptance of the principle of "majority rule". A broad definition of bargaining or bargaining subjects to include any communication between employer and employee and employee and employee will undermine the statutorily guaranteed rights of a minority to present grievances to their employer, and for employees to freely choose their representatives. The Wisconsin Supreme Court decision which prohibits employees from speaking at public meetings to their employer is an example of an unsound application of the "majority rule" principle especially when that decision is analyzed in the context of public sector labor relations environment.

2. *The Wisconsin Supreme Court decision incorrectly interprets the labor relations majority rule principle as mandating not only that employers cease and desist from negotiating with individuals or groups of employees but also cease and desist from merely listening to individuals or groups of employees.*

School Boards are obligated to recognize and respect the constitutional rights of their employees. *Tinker v. Des Moines*, supra, *Pickering v. Board of Education*, supra, *Wood v. Strickland*, supra. These obligations are, it must

be remembered, in addition to and superior to a board of education's statutory obligations as a municipal employer. All teachers employed by Board of Education Joint School District No. 8 possess the rights to speak freely and to petition possessed by other citizens. However, only Madison Teachers Incorporated, the exclusive representative of the teachers of the district, possesses the right to bargain with the Board of Education.

The Wisconsin Supreme Court decision in this case is constitutionally defective because it equates mere speaking and listening with other than the exclusive representative to bargaining with other than the exclusive representative. Yet the Wisconsin Supreme Court states:

> "To the extent that the WERC and circuit court decisions in this case infringe upon the freedoms to speak and petition the federal and state governments, they are within the limits imposed on the restriction of those rights by the United States Supreme Court decisions, and the decisions of this court." *City of Madison*, 69 Wis. 2d at 211, 231 N.W. 2d at 212. (A.P. 188, 89)

The court cites the case of *Medo Photo Supply Corporation v. NLRB* (1944), 321 U.S. 678 to support this proposition. In *Medo* this Court held that an employer who bargains with other than the "exclusive" representative of his employees commits an unfair labor practice. The *Medo* case is of crucial importance to the case at bar, however, not because of the majority rule principle it establishes, which is conceded by every party, but because this Court therein considers the type of private sector employer activities which can properly be judged "negotiating" with other than the exclusive bargaining representative. In the *Medo* case, the employer conferred with dissident employees so

as to arrive at a settlement on the matter of wages. The employer refused to negotiate with the exclusive representative on matters of wages, hours and working conditions. The *Medo* case stands for the proposition that negotiations with other than the exclusive representative involve more than an employer listening to dissident employees.

In the case at bar, a teacher was allowed to speak at a regular public meeting of the City of Madison Board of Education. (A. P. 130). Review of his comments indicates he specifically recognized the validity of the existing bargaining relationship between the Madison Board of Education and Madison Teachers Incorporated, the certified representative of district teachers. (A. P. 130, 131). Indeed, his remarks were addressed to both parties. (A. P. 130). The speaker merely provided the bargaining parties with information about certain teachers' feelings on a subject being negotiated by the parties. (A. P. 130, 131). He never sought to displace the exclusive representative. (A. P. 130, 131). The Board of Education merely listened to his remarks. (A. P. 131-132). The only oral exchange between Mr. Holmquist and the Board was a question of the president at the conclusion of his talk as to whether or not he intended to communicate the petition he had read to the Board of Education. (A. P. 131). No other meetings or discussions occurred between Mr. Holmquist and the Board of Education or its members. (A.P. 132). Indeed the whole matter of "fair share" was negotiated with Madison Teachers Incorporated and tentative agreement reached with the exclusive representative of the teachers the next day. (A. P. 132).

The Board of Education never conferred with employees so as to arrive at a settlement on "fair share". The Board of Education never refused to bargain the matter of fair share with Madison Teachers Incorporated. Indeed, the record clearly establishes that the issue of "fair share" was settled at the bargaining table by Madison Teachers Incorporated and the Board of Education. (A. P. 132)

The Wisconsin Supreme Court perverted the labor relations theory of "majority rule" and this Court's holding in the *Medo* case when it held that a public employer who listens to his employees is negotiating with them. The definition of negotiation adopted by the Wisconsin Supreme Court must be rejected simply because, contrary to the court's conclusion, the infringement upon the freedom to speak and petition it sanctions is *far beyond* the limits ever imposed on the restriction of those rights by the United States Supreme Court. Professor Clyde W. Summers summarizes this argument well:

> "... Public sector bargaining is part of the governmental process and the responsible political officials are entitled, if not obligated, to listen to the views of all those who have an interest in the decision. Listening to the views of a spokesman for a group of employees does not constitute bargaining, for it gives the spokesman no different status or access to the political process than any other citizen. It does not reduce the advantages which the majority union obtains by access to the special structure and procedures of collective bargaining. At most, it reduces the majority union's ability to conceal the fact that employees do not unanimously support its position on every demand.

> "Exclusive recognition has never, in law or in fact, guaranteed the majority union any such right to conceal. The establishment of collective bargaining in the public sector, as a method of governmental decision making, should certainly not have the effect of obstructing public disclosure of facts and views relevant to the political decision to be made." Summers, *Public Employee Bargaining: A Political Perspective* 83 Yale L.J. 1156 at 1198 and 1199 (1974).

B. The Wisconsin Supreme Court Decision Must Also Be Reversed Since The Order Affirmed By The Court Is Constitutionally Defective.

The order of the Wisconsin Employment Relations Commission affirmed by the Wisconsin Supreme Court reads as follows:

> "It is ordered that Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8 et al.:
>
> 1. Shall immediately cease and desist from permitting employees other than representatives of Madison Teachers Incorporated to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Incorporated.
> 2. Take the following affirmative action which will effectuate the policies of the Municipal Employment Relations Act ...

(b) Immediately notify Madison Teachers Incorporated that they will not permit any employee in the bargaining unit represented by Madison Teachers Incorporated other than a representative of Madison Teachers Incorporated to appear and speak on matters subject to collective bargaining between them and Madison Teachers Incorporated." (A. P. 134-135).

This order is clearly constitutionally defective.

1. The order imposes a constitutionally impermissible prior restraint on pure speech.

The order is a predetermined categorical denial of the speech related activity, and as such, must be considered a prior restraint. The order mandates that the Board of Education refuse a teacher who is not a representative of the exclusive bargaining unit, the opportunity to speak at regular meetings on matters subject to collective bargaining. Thus, the Board is expected to prevent certain teachers from utilizing the public forum provided to other members of the community. Any system of prior restraint against expression bears a heavy burden against its constitutional validity. *United States v. Washington Post Co.* (1971), 403 U.S. 713.

In *Southwest Promotions Ltd. v. Conrad* (1975), 420 U.S. 546, this Court held that the rejection of an application for the use of a public forum accomplished a prior restraint lacking in constitutionally required

procedural safeguards. In its opinion, this Court identified the problem with prior restraint of speech:

> "Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship — reflecting the natural distaste of a free people — is deep-written in our law." 420 U.S. at 553.

The constitutional infirmity of the prior restraint imposed by the WERC Order is not removed because it simply prevents certain teachers from exercising their freedom of expression in only one particular public forum. One is not to have the exercise of his liberty abridged on the plea that it may be exercised in some other place, thus access to other forums does not justify an otherwise impermissible restraint on speech. *Conrad,* supra, 400 U.S. 546, 556. Clearly, Mr. Holmquist could have addressed the issues in other public forums. His First Amendment rights require that he be allowed to do so and what he had to say in protected speech under the First Amendment. Under the decision of the Wisconsin Supreme Court in *City of Madison*, his speech, permissible in other forums, is excluded from a particular public forum, solely because it is a school board which has provided the forum. Prior restraint cannot be justified on the basis that governmental officials would find a different forum more convenient or less likely to create a disturbance.

The system of prior restraint imposed by the Wisconsin Supreme Court is simply incapable of bearing

the heavy burden against its constitutional validity in that it fails to provide precise and clear standards as to whom will be permitted to speak and upon what matters of public concern.

2. *The order attempts to restrict a broader range of speech activities than is constitutionally acceptable.*

A central theme in this Court's concern with overbreadth and its relationship to First Amendment rights is that when a statute is overbroad, there is a potential for sweeping and improper application in areas of First Amendment rights. *Goodling v. Wilson* (1972), 405 U.S. 518. When a statute is directed at "pure speech" and especially the expressive content of speech, a statute should be closely scrutinized because of its potential deterrence to the exercise of First Amendment rights. An ordinance may be overbroad if it prohibits constitutionally protected conduct. *Grayned v. City of Rockford* (1972), 408 U.S. 104. As emphasized earlier, the concept of negotiation and the exclusive bargaining rights of the majority representative established by state law under the Wisconsin Supreme Court's holding infringes on the rights of a minority member to have access to a public forum, and the corresponding duty of the School Board to make that forum available on an evenhanded basis. The order is thus overbroad in that it restricts pure speech as opposed to restricting bargaining with the Board of Education at its regular public meeting in derogation of the rights of the exclusive representative.

In addition, "matters subject to collective bargaining", although defined by statute, is a very broad term under Wisconsin labor law. Prohibition of public comment to the School Board on these subjects by minority representatives clearly infringes on their right to comment on subjects protected by *Pickering v. Board of Education* (1968), 391 U.S. 563. This problem is further complicated by the risk of personal liability if members of the Board of Education violate the constitutional rights of their employees. *Wood v. Strickland* (1974), 420 U.S. 308. Thus, the Wisconsin Supreme Court decision places Board members in the dilemma of violating the Wisconsin Employment Relations Commission order or denying First Amendment and Fourteenth Amendment rights to teacher employees. The overbreadth of the Wisconsin statute thus has a chilling effect on the School Board's access to vital information which, as public officials, they have an obligation to listen to and consider.

3. *The order must be voided as constitutionally vague since its prohibitions are not clearly defined.*

An enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford* (1972), 408 U.S. 104. Justice Robert Hansen, in dissent, eloquently states the concern of the appellants with the vagueness of the department order.

> "In the First Amendment context, the question of scope or uncertainty as to the future application (of an order) goes to the chilling effect of the order upon the right of free speech. The Employment Relations Board

concluded that when a teacher asks to speak to the Board during a public discussion period at a regular Board meeting, the Board must inquire as to the nature of the speech. Then, if the topic is a matter subject to collective bargaining, the Board must refuse to allow the teacher to speak. What matters are subject to collective bargaining? The statute provides that a municipal employer must bargain in good faith on matters of wages, hours, and working conditions. As Appellant suggests, certain questions arise. Suppose the teacher wishes to speak on class size or teacher aides, the establishment of summer programs, school reading projects, in-service training or the special treatment and handling of problem students. Are these matters subject to collective bargaining on which the Board is restricted from receiving information from teachers other than the majority representative of its employees? Nothing in the Municipal Employment Relations Act suggests that a teacher does not have a right to speak at public meetings on these matters. Yet all could be covered or affected by a collective bargaining agreement. It is in this sense that the Department order is vague, not meaning that it cannot be understood and applied by this School Board to the facts here, but because the difficulty of locating its outer limits will have a chilling effect both on the rights of teachers to speak and school boards to listen on subjects arguably relatable to bargaining, but directly concerned with the well-being of school children and the community. The prudent school board would resolve doubts against the right of an individual teacher to speak on marginal or in doubt topics, and this is what is meant by having a chilling effect. The writer would hold the order in its scope and breadth, to have a constitutionally impermissible temperature-lowering effect on the exercise of First Amendment rights." *City of Madison* 69 Wis. 2d at 222, 223; 231 N.W. 2d at 218. (A. P. 202, 203).

4. *The order cannot be allowed to stand since it mandates that school boards reject their constitutional obligation to provide a neutral public forum for the expression of ideas.*

A central issue in the discussion of the First Amendment with respect to the WERC order is whether a state or local authority may permit or require only one side of public employee labor disputes to be heard in a public forum and exclude another group wishing to present another viewpoint in the forum. The case most clearly in point with respect to this issue is *Police Dept. of City of Chicago v. Mosley* (1972), 408 U.S. 92. In the *Mosley* case a Chicago city ordinance prohibited all picketing within 150 feet of a school except peaceful labor picketing of any school involved in a labor dispute. Mosley had engaged in the picketing of a high school protesting racial discrimination and sought declaratory and injunctive relief in federal court. The Supreme Court held that the city ordinance makes an impermissible distinction between labor picketing and other picketing.

In the *City of Madison* case, under the WERC order certain groups are afforded access to a public forum to speak on labor relation matters while other groups are prohibited from speaking on these same subjects. The conduct sought to be regulated is pure speech and there can be no doubt that it is within the First Amendment's protection unless a substantial governmental interest can be served in the discrimination among those permitted to

speak. However, even where regulation serves a substantial governmental interest, the regulation must do so in a manner consistent with the Equal Protection Clause.

The WERC ruling specifically allows the exclusive bargaining agent to speak at Board meetings. This ruling does not prohibit the discussion of bargaining issues at open Board of Education meetings; rather, it controls who may speak on matters which may be subject to labor negotiation. Thus, the order is a clear departure from neutrality and one which seeks to control the content of what is said about matters subject to labor negotiation. This Court has condemned such content control:

> "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.
>
> "Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression." (Footnote omitted.) *Mosley* 408 U.S. at 99.

The WERC Order which is allegedly based upon a desire to maintain labor peace, cannot stand even though

it may be based on a legitimate governmental concern because it is a departure from the evenhanded control of access to a public forum which is required of a governmental body under *Mosley*.

This Court recently summarized the obligations of a municipality regarding access to a public forum in *Hudgens v. NLRB* (1976), 96 S.Ct. 1029. In that case the Court stated that when state action is involved, a court's duty is to apply the standards of the First Amendment which requires "above all else" that expression must not be restricted by government "because of its message, its ideas, its subject matter or its content." *Hudgens v. NLRB* 96 S.Ct. at 1037.

There can be no question that a school board meeting, a portion of which is devoted to public comment, is a First Amendment forum of the purest kind. American tradition favors free and open debate in the town hall meeting as much as it favors a politically neutral military. *Greer v. Spock* (1976), 44 U.S.L.W. 4380. None of the special reasons for limiting First Amendment rights exist at a community school board meeting which may exist within an institution such as a prison or a school. There is an equality of status in the field of ideas, and once the forum is opened up by government, the government must afford all points of view an equal opportunity to be heard.

In determining whether a speech may be limited with respect to a particular forum, the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. *Grayned v. City of Rockford* 408 U.S. 104 at 116. While the timing of the statement by Mr. Holmquist may have been unfortunate for MTI, there is no

question that his manner of expression (i.e., speech) was compatible with the normal activity of that particular place at that particular time (public comment directed at board members). Simply, this Court must reject an order which requires a governmental body to selectively listen when it is charged with deciding public business in a public forum.

III.

A VALID RECONCILIATION OF CONSTITUTIONAL RIGHTS TO SPEAK AND PETITION WITH THE LABOR RELATIONS DOCTRINE OF MAJORITY RULE WILL AT THE LEAST PROVIDE THAT A PUBLIC EMPLOYER MAY LISTEN TO ANY AND ALL EMPLOYEES REGARDING NEGOTIABLE MATTERS, RECEIVE INFORMATION, THOUGHTS, OR SENTIMENTS FROM ALL EMPLOYEES EVEN WHEN THE EXCLUSIVE REPRESENTATIVE IS ABSENT AS LONG AS THE PUBLIC EMPLOYER REFRAINS FROM EVIDENCING AN EXPRESS OR IMPLIED DESIRE TO DEAL DIRECTLY WITH EMPLOYEES AND REFRAINS FROM ACTION SOLICITING OR INDUCING EMPLOYEES TO DEAL DIRECTLY WITH IT.

Federal case law outlines the nature of a private employer's duty to bargain exclusively with the majority representative of his employees, and also indicates under what circumstances a private employer will be found to have violated the principle of "majority rule". The cases

indicate that a private employer may receive information concerning bargaining matters from employees, discuss matters subject to collective bargaining with members of the bargaining unit other than the exclusive representative of its employees, and listen to negative information about the majority representative without violating its duty to bargain or interferring with the bargaining rights of its employees. A private employer, however, must refrain from evidencing an express or implied desire to deal directly with the employees and refrain from engaging in affirmative action, soliciting or inducing the employees to deal directly with him. The fact that information received concerning negotiable issues may influence the decision of the employer in bargaining with the exclusive representative does not translate receipt of information from third parties into "bargaining" or "negotiating" with third parties to the exclusion of the certified representative. *White Sulphur Springs Co. v. NLRB* 136 NLRB 375, 49 LRRM 1778 enforced as modified, 316 F. 2d 410, (CADC, (1963)), 52 LRRM 2608 (1962); *Lawn Boy Div., Outboard Marine Corp.* (1963), 143 NLRB 535, 53 LRRM 1342; *Coast Radio Broadcasting Corp.* (1965), 151 NLRB 117, 58 LRRM 1574; *American Printing Co. and International Pressmen Association Union* (1968), 173 NLRB 17, 69 LRRM 1238; *Tabasco Prestressed Concrete Co.* (1969), 177 NLRB 101, 71 LRRM 1565.

Admittedly the cases cited are decisions of the National Labor Relations Board. However, these decisions are consistent with the scope of the theory of "majority rule" reviewed earlier in the brief. Further, remember the Wisconsin Legislature embraced this theory in adopting the Municipal Employment Relations Act. Therefore, the reconciliation of employee rights within the industrial

democracy established by the acceptance of "majority rule" in private sector labor relations is a solid starting point for developing the reconciliation of individual employee rights in the public sector labor relations environment.

Adoption of the principle that public employers may listen to employees and receive information from their employees on all matters as long as the public employer refrains from evidencing an express or implied desire to deal directly with its employees and refrains from action soliciting or inducing employees to deal directly with him, recognizes and promotes the unfettered exchange of ideas underlying the constitutional protections of speech and petition. *New York Times v. Sullivan* (1964), 376 U.S. 254. Further, the adoption of such a rule would allow the widest room for discussion and the narrowest range for its restriction which is of fundamental importance to our democratic society and consistent with our profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.

Simply, a reconciliation of constitutional rights and the labor relations doctrine of "majority rule" in the public sector which allows public employers to merely listen is not only sound labor relations law but also, more importantly, sound constitutional law.

CONCLUSION

Section 111.70 (3) (a) 1. and 4. of the Wisconsin Statutes, as interpreted by the Wisconsin Supreme Court unconstitutionally intrudes on the rights guaranteed individuals and obligations imposed on governmental

bodies by the First Amendment. The governmental interest in promoting stable labor relations in the public sector falls far short of providing adequate basis for denying individuals other than an exclusive bargaining representative from appearing and speaking at regular public meetings of a governmental body which seeks comment on matters of concern to the well being of the community and school children. A public employer must be able to listen to any of its employees, without having to be concerned that to do so would violate his duty to bargain solely with the employees exclusive representative. Indeed, such a reconciliation of the competing interests in this case is the only result which will promote sound public sector employment relationships and preserve the sanctity and sanction of the liberties embraced by the First Amendment.

The judgment of the Wisconsin Supreme Court must be reversed.

Respectfully submitted,

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APPENDIX TO BRIEF

Relevant Federal Statutes
29 USC

§141. Short title; Congressional declaration of purpose and policy

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 USC

§157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title.

29 USC

§158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by

any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159 (a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative

of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purpose of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to

recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representative may not appropriately be raised under section 159 (c) of this title,

(B) where within the preceding twelve months a valid election under section 159 (c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159 (c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159 (c) (1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in

the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification — ...

29 USC

§159. Representatives and elections — Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other

conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards

if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Secret ballot; limitation of elections

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158 (a) (3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Relevant WISCONSIN STATUTES

Section 111.70 Wis. Stats. (1971)

111.70 Municipal employment. (1) DEFINITIONS. As used in this subchapter:

(a) "Municipal employer" means any city, county, village, town, metropolitan sewerage district, school district, or any other political subdivision of the state which engages the services of an employe and includes any person acting on behalf of a municipal employer within the scope of his authority, express or implied.

(b) "Municipal employe" means any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employe.

(c) "Commission" means the employment relations commission.

(d) "Collective bargaining" means the performance of the mutual obligation of a municipal employer through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality. its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter.

(h) "Fair-share agreement" means an agreement between a municipal employer and a labor organization under which all or any of the employes in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues

uniformly required of all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employes affected by said agreement and to pay the amount so deducted to the labor organization.

(j) "Labor organization" means any employe organization in which employes participate and which exists for the purpose, in whole or in part, of engaging in collective bargaining with municipal employers concerning grievances, labor disputes, wages, hours or conditions of employment.

(k) "Person" means one or more individuals, labor organizations, associations, corporations or legal representatives.

(m) "Prohibited practice" means any practice prohibited under this subchapter.

(n) "Referendum" means a proceeding conducted by the commission in which employes in a collective bargaining unit may cast a secret ballot on the question of authorizing a labor organization and the employer to continue a fair-share agreement. Unless a majority of the eligible employes vote in favor of the fair-share agreement, it shall be deemed terminated and that portion of the collective bargaining agreement deemed null and void.

(3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:

1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

2. To initiate, create, dominate or interfere with the formation or administration of any labor or employe organization or contribute financial support to it, but the employer shall not be prohibited from reimbursing its employes at their prevailing wage rate for the time spent conferring with the employes, officers or agents. Supervisors may remain members of the same labor organization of which their subordinates are members, but such supervisor shall not participate in determinations of the collective bargaining policies of such labor organization or resolution of grievances of employes. After January 1, 1974, said supervisors shall not remain members of such organizations.

3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement.

4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that

support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

6. To deduct labor organization dues from an employe's or supervisor's earnings, unless the municipal employer has been presented with an individual order therefore, signed by the municipal employe personally, and terminable by at least the end of any year of its life or earlier by the municipal employe giving at least 30 days' written notice of such termination to the municipal employer and to the representative organization, except where there is a fair-share agreement in effect.

(b) It is a prohibited practice for a municipal employe, individually or in concert with others:

1. To coerce or intimidate a municipal employe in the enjoyment of his legal rights, including those guaranteed in sub. (2).

2. To coerce, intimidate or induce any officer or agent of a municipal employer to interfere with any of its employes in the enjoyment of their legal rights, including those guaranteed in sub. (2), or to engage in any practice with regard to its employes which would constitute a prohibited practice if undertaken by him on his own initiative.

3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is the recognized or certified exclusive collective bargaining representative of employes in an appropriate collective bargaining unit. Such refusal to bargain shall include, but not be limited to, the refusal to execute a collective bargaining agreement previously agreed upon.

4. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them.

5. To coerce or intimidate an independent contractor, supervisor, confidential, managerial or executive employe, officer or agent of the municipal employer, to induce him to become a member of the labor organization of which employes are members.

(4) POWERS OF THE COMMISSION. The commission shall be governed by the following provisions relating to bargaining in municipal employment in addition to other powers and duties provided in this subchapter:

(a) *Prevention of prohibited practices.* Section 111.07 shall govern procedure in all cases involving prohibited practices under this subchapter except that wherever the term "unfair labor practices" appears in s. 111.07 the term "prohibited practices" shall be substituted.

(b) *Failure to bargain.* Whenever a dispute arises between a municipal employer and a union of its employes concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for a declaratory ruling. The decision of the commission shall be issued within 15 days of submission and shall have the effect of an order issued under s. 111.07. The filing of a petition under this paragraph shall not prevent the inclusion of the same allegations in a complaint involving prohibited practices in which it is alleged that the failure to bargain on the subjects of the declaratory ruling is part of a series of acts or pattern of conduct prohibited by this subchapter.

(d) Selection of representatives and determination of appropriate units for collective bargaining. 1. A representative chosen for the purposes of collective bargaining by a majority of the municipal employes voting in a collective bargaining unit shall be the exclusive representative of all employes in the unit for the purpose of collective bargaining. Any individual employe, or any minority group of employes in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of their own choosing, and the municipal employer shall confer with said employe in relation thereto, if the majority representative has been afforded the opportunity to be present at the conferences. Any adjustment resulting

from these conferences shall not be inconsistent with the conditions of employment established by the majority representative and the municipal employer.

2. a. The commission shall determine the appropriate bargaining unit for the purpose of collective bargaining and shall whenever possible avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal work force. In making such a determination, the commission may decide whether, in a particular case, the employes in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a unit. Before making its determination, the commission may provide an opportunity for the employes concerned to determine, by secret ballot, whether or not they desire to be established as a separate collective bargaining unit. The commission shall not decide, however, that any unit is appropriate if the unit includes both professional employes and nonprofessional employes, unless a majority of the professional employes vote for inclusion in the unit. The commission shall not decide that any unit is appropriate if the unit includes both craft and noncraft employes unless a majority of the craft employes vote for inclusion in the unit. Any vote taken under this subsection shall be by secret ballot.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT No. 8,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED,

Appellees.

BRIEF ON BEHALF OF MADISON TEACHERS INCORPORATED, APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT No. 8,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED,

Appellees.

BRIEF ON BEHALF OF MADISON TEACHERS INCORPORATED, APPELLEE

QUESTION PRESENTED

Whether a state, in furtherance of its public sector labor policy of recognizing the principal of exclusive representation, may prohibit a school board from engaging in negotiations and interfering with and restraining bargaining unit employees in their right to bargain collectively through representatives of their own choosing on mandatory subjects of bargaining, then under negotiation, at a public meeting of said school board.

STATEMENT OF THE CASE

The Appellee, Madison Teachers Incorporated (hereinafter MTI) agrees with the Appellant's statement of the case except insofar as the following corrects or adds to Appellant's statement.

Legislation providing for fair-share agreements became effective on November 11, 1971 by Chapter 124, Laws of 1971. On November 17 MTI submitted its third fair-share proposal to conform with the new laws (A.P. 14) By this time, however, thirteen unresolved issues crowded the bargaining table. Two of them loomed large: (1) fair-share, and (2) final and binding arbitration of teacher dismissals and nonrenewals. The Board of Education (hereinafter Board) had opposed both arbitration and fair-share throughout negotiations. The parties were at impasse concerning negotiations for the 1972 collective bargaining agreement. (A.P. 61) On the other hand, one of the Board's bargaining representatives indicated, informally, that (a) fair-share possibly might be accepted by the Board although arbitration of dismissals and nonrenewals could not possibly be accepted; (A.P. 69) and (b) two members of the Board would approve fair-share if the union withdrew its arbitration proposal. (A.P. 49)

On November 14, 1971, Albert Holmquist and Ralph K. Reed, both of whom are teacher employee bargaining unit members, and both of whom are not members of MTI, sent a letter to all teacher

bargaining unit personnel addressed to "Dear Fellow Madison Educator." (A.P. 83, 135-136) Said letter, headed "EC-OLOGY" — meaning "Educator's Choice — Obligatory Leadership or Goverance by You" asked the addressee to "save freedom of choice" and stated that "a closed shop (agency shop) removes the freedom." The bottom portion of the letter was in the form of a ballot allowing the addressee to express his opposition to "Agency Shop." The letter solicited responses, and two hundred were received, the majority of which were favorable to the Holmquist-Reed position on fair-share. (A.P. 83)

Thereafter, Holmquist and Reed called a meeting of those teachers who had indicated they would work actively against any fair-share agreement. (A.P. 83) Said meeting, held on December 2, 1971, was attended by fourteen teachers, seven of whom were MTI members and seven of whom were not. (A.P. 83)

As a result of the meeting of the fourteen teachers, a letter of transmittal (A. P. 136-138), a memorandum entitled "Points of Information" (A. P. 138-139) and a petition (A. P. 140) were drawn up. Printed copies of all such documents were distributed to the teachers employed by the School District on December 3, 4, and 5, 1971. (A. P. 84-86)

A regular meeting of the Board of Education was scheduled to be held during the evening of December 6, 1971. (A. P. 14) In the mid-afternoon of

December 6, 1971, John Matthews, Executive Director of MTI, learned that Holmquist intended to address the Board of Education at its scheduled meeting on the matter of fair-share. (A. P. 15-16)

Prior to such Board meeting, on the same day, Mr. Matthews and Mr. Joe Mason, a teacher employed by the Board, met with Mr. Keith Yelinek, a member of the Board of Education, in the parking lot of the Administration Building (where the Board meeting was to be held). (A. P. 16) Matthews and Mason advised Yelinek of Holmquist's intentions of addressing the Board of Education that evening in regard to fair-share. Furthermore, Matthews presented Yelinek with copies of the Wisconsin Employment Relations Commission (hereinafter WERC) and Circuit Court decisions regarding *Board of School Directors v. WERC*, (1969), 42 Wis. 2d 637, 168 N.W. 2d 92, with highlighted portions which establish a prohibition in Wisconsin against a minority union representative negotiating with a public employer "under the guise of a public meeting." (A.P. 17) When Matthews inquired whether MTI should bring this matter to the attention of the Board, Yelinek said he (Yelinek) "would take care of it." (A.P. 17)

Still only minutes before the December 6 Board meeting, Matthews met with Holmquist and Reed. He apprised them of the same circuit court decision. (A. P. 43) Matthews urged Holmquist and Reed not to make a presentation against fair-share "or we were going to lose the whole ballgame." (A. P. 50)

Nevertheless, at the portion of the meeting called "Public Appearances" Holmquist rose to speak. He had concluded that people were confused as to the meaning of fair-share. His aim was to defeat fair-share this time around. (A. P. 109) He said to the Board: [(A.P. 22, 69, 99); see Commission's Finding of Fact #12 (A.P. 130)]

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package."

Holmquist then read to the Board the text of a petition he had circulated among bargaining unit teachers dated December 6, 1971 which read as follows:

> "To: Madison Board of Education
> Madison Teachers, Incorporated
>
> We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers, Incorporated and the Madison Board of Education be deferred this year. We propose the following:
>
> 1) The Fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups.

2) The findings of this study be made public.

3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal.

4) The results of this written ballot be made public." (See A. P. 100)

Holmquist then added:

"We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the 'whole package' and therefore is not issue specific... Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it. For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation." (A. P. 100)

School board president, Mrs. Doyle, asked whether Holmquist intended to communicate the petitions to the board, and Holmquist responded affirmatively. (A. P. 101)

MTI feared Holmquist's action was:

" * * * the most damaging thing to our strategy that had occurred in the last two years. ***(I)t undermined the strategy we were attempting. It hurt us drastically" (A. P. 70)

The Board repaired to executive session. It passed a resolution which said:

"It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and *not* including agency shop: if the MTI does not accept this as a total package the offer of arbitration is withdrawn." (Emphasis the Board's.) (A. P. 23-24)

Negotiations resumed the next day. The Board had a new team. Superintendent Ritchie opened the meeting by presenting the above-quoted board resolution and saying "This is the deal." (A.P. 24) MTI conceded.

"We decided *** that was the best we were going to get in view of the motion that was passed by the board the night before." (A.P. 52)

MTI filed a complaint with the Wisconsin Employment Relations Commission on January 6, 1972, alleging that the Board had committed prohibited practice in violation of sec. 111.70 (3) (a) 1. and 4., Stats. The complaint sought the issuance of an order by the WERC requiring the school board to:

1. Cease and desist from:

a) negotiating now and in the future as concerns questions of wages, hours and conditions of employment with individual employees or groups of employees.

b) interfering with and restraining its bargaining unit employees in their right to bargain collectively through representatives of their own choosing.

2. Take the following affirmative action to effectuate the policies of Section 111.70, Wis. Stats.

a) Expunge from the official minutes of the December 6, 1971 meeting of the Board of Education, any and all reference to the remarks of Albert M. Holmquist.

b) Expunge from the official minutes and records of the School District any reference to any written petitions, including such written petitions themselves received by the Board from Albert M. Holmquist on December 6, 1971. (A.P. 6)

On September 13, 1972, the WERC concluded that the Board of Education had committed a prohibited practice and issued an order that the Board:

"Shall immediately cease and desist from permitting employees, other than

representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc."

SUMMARY OF ARGUMENT

I

This case essentially involves a labor relations problem set in the context of public employment. More particularly, the issue presented for resolution is whether a bargaining unit member representing a dissident minority within a public employer bargaining unit is constitutionally entitled to collectively bargain and/or negotiate with the employer on behalf of said dissident minority, especially as to a matter that is a mandatory subject of bargaining.

A. All the facts and circumstances herein unequivocably indicate that Albert Holmquist addressed the Board of Education as a representative and collective bargaining agent for a dissident minority (ECOLOGY) in the bargaining unit and not as an individual citizen. As an individual acting in the capacity of a representative of a dissident minority, any actions or communications made in the context of collective bargaining must meet the standards of propriety established under the labor relations laws and are not of the same high constitutional status as communications

made by individual citizens acting in their civic role. The First and Fourteenth amendments therefore are not applicable to the facts herein.

B. The Board of Education, through its agents and directly, aided and abetted the dissident minority (ECOLOGY) in effectively promoting a minority position on a mandatory subject of bargaining. Since fair-share is a mandatory subject of bargaining and any resolution of the fair-share issue must be accomplished through the collective bargaining process by the appropriate bargaining representatives, the Board of Education, by allowing itself to be influenced by a minority representative (an inappropriate bargaining agent) and by directly aiding said minority representative, interfered with the rights of its bargaining unit employees to collectively bargain through MTI as the representative of their own choosing. The Board did this with full advance knowledge of what Mr. Holmquist intended to do and in what capacity he was acting. The Board cannot avoid regulation of its conduct as a public employer merely by shifting some component(s) of its collective bargaining activities to a public forum.

C. Fair-share is a mandatory subject of bargaining that was in fact a subject of intense bargaining throughout 1971.

II.

A. and B. The majority rule principle and its corollary, the exclusivity doctrine, have been endorsed in Wisconsin and at the federal level and approved in the Courts at all levels. Majority rule and exclusivity are viewed as pivotal to a viable collective bargaining structure. The First and Fourteenth Amendment have not been viewed by this Court as a bar to the majority rule and exclusivity principles.

C. Denying a representative of a minority of the bargaining unit employees the right to address the employer on matters subject to collective bargaining does not infringe on Constitutional freedoms. The State has a vital interest in regulating employment relations in the private sector and, perhaps more importantly, in the public sector which is not precluded by Constitutional prohibitions.

III.

Public policy considerations demand that there be a peaceful and systematic procedure for the conduct of employment relations in the public sector. Experience has found collective bargaining to best fulfill that need. Labor peace is as, if not more, crucial in the public sector than in the private sector. Public employees would certainly be

second class citizens if they were not permitted some means of *effective* participation in ordering their labor relations through collective bargaining mechanisms. If the State sees fit to administer public sector labor relations through the collective bargaining mechanism, there is no Constitutional barrier to its so doing.

ARGUMENT

I. This Case Presents The Question Of Whether A Bargaining Unit Member Representing A Dissident Minority Within A Public Employer Bargaining Unit Is Constitutionally Entitled To Collectively Bargain and/Or Negotiate With Said Employer On Behalf Of Said Dissident Minority.

The ultimate question presented for adjudication in the case at bar is whether the conduct complained of by the Appellee (MTI) in its original complaint is violative of Section 111.70 Wis. Stats. by its incursion on, interference with, and derogation of the collective bargaining functions of the exclusive bargaining agent. MTI poses no challenge or argument against the unique prominence and vigilent defense accorded First Amendment and Fourteenth Amendment rights in

our Constitutional system. The posture of uncompromising deference accorded the fundamental Constitutional rights by this Court in its decisions is an integral component of the fortress of liberty that our nation has built. MTI would play no role in urging its dismantling.

The case at bar is essentially a problem of labor relations set in the context of public employment. Any attack on the order issued by the Wisconsin Employment Relations Commission should not divert attention from the essential facts that give rise to the case itself and its proper adjudication on the merits.

A. *Albert Holmquist addressed the Board of Education as a representative and collective bargaining agent for a dissident minority in the bargaining unit and not in the capacity as an individual citizen.*

A regular meeting of the Board of Education was scheduled for the evening of December 6, 1971. Prior to said meeting, Albert Holmquist and Ralph Reed, members of the teacher bargaining unit, decided to organize active opposition to the MTI fair-share proposal and formed a group called ECOLOGY to propound a minority position in regard thereto. (A.P. 79-90). Holmquist and Reed

proceeded to draft a letter opposing fair-share, had it commercially printed and mailed to all bargaining unit personnel. (A.P. 82, 135-136). They also applied for and obtained a post office box under the name ECOLOGY and signed the letter as "teacher co-chairmen." (A.P. 83, 135-136). The letter was mailed on November 14, 1971; approximately 200 replies were received, most of which were favorable to the ECOLOGY position. Holmquist and Reed then called a meeting of teachers actively opposed to fair-share and said meeting was held on December 2, 1971. At that meeting the group drafted a petition (A.P. 140) and a list of points of information. (A.P. 138-139). The group discussed logistics for circulating the documents drafted and developed a way to circulate them. (A.P. 85-86). The petition, points of information, and a cover letter were reproduced by a commercial printer and were then mailed to contacts for circulation in the schools. (A.P. 87). There were such contacts for all but one school. (A.P. 87). The documents were circulated in anticipation of a presentation being made of the petition and ECOLOGY's position at the Board of Education meeting scheduled for December 6, 1971.

Mr. Holmquist appeared at the Board meeting held on December 6, 1971, and he was permitted to speak to the Board. He prefaced his remarks to the Board by stating:

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am *another teacher*. I *represent* an informal committee of 72 teachers in 49 schools..."

Mr. Holmquist then advised the Board of the survey taken by ECOLOGY and read to the Board the text of a petition circulated by ECOLOGY among bargaining unit members. (A.P. 140). He advised the Board that 417 teachers from 31 schools had signed the petition as of the time of his address.

From the very outset of his statement, Mr. Holmquist addressed the Board not as a citizen addressing an elected public body, but as an employee bargaining agent representing a dissident minority in a bargaining unit. In such capacity, Holmquist was trying to achieve a collective bargaining goal, i.e. to persuade the Board, as employer, to hold fast or adopt a position in collective bargaining contrary to the position of the exclusive bargaining representative.

The characterization of Holmquist as a private citizen petitioning a public body in a public forum defies the facts. The elaborate and sophisticated efforts made to organize and enlist support of bargaining unit members for the position developed by ECOLOGY present a context within which Holmquist's explicit claim to a bargaining unit constituency can only justify him being viewed as a bargaining representative subject to the labor laws and policies of the State of Wisconsin. Having effectively established himself as a collective bargaining representative, albeit without

formal status, Holmquist cannot then head for cover under the Constitution in the guise of a citizen exercising his First Amendment rights.

If Holmquist had appeared before the Board and expressed his views regarding fair-share or any other topic in his capacity as a citizen rather than as a teacher and collective bargaining representative representing a dissident bargaining unit minority, he would certainly have been acting within his Constitutional rights and without litigious consequences. However, Holmquist's appearance was as the leader/representative of a dissident minority in the bargaining unit advocating a position on a mandatory subject of bargaining, which position was directly contrary to the position taken by the exclusive collective bargaining agent elected by the majority. Whatever his intent, Holmquist was in fact acting as a collective bargaining representative. As such, it matters not that his statement was made at a public meeting. Certainly, if his statement to the Board would have been impermissible in a private conference, it can be no more acceptable in public. To hold thus would be to say that prohibited labor practices are acceptable so long as they are committed in the guise of a public meeting.

In addition, Holmquist was urging the Board of Education to adopt the position of ECOLOGY in its capacity as an employer. Certainly, as a mandatory subject of bargaining, the fair-share issue could not be settled by the School Board's (management's) fiat or decree. Under law the fair-

share issue had to be disposed of through the collective bargaining process. Holmquist, as representative of ECOLOGY, was, therefore, urging upon the Board a position that it could only adopt and act on its capacity as employer in a collective bargaining setting. Holmquist did not seek to nor did he in fact address the Board as an individual citizen speaking to his elected officials. Instead, he took every measure to establish himself as a spokesman for, and representative of, a dissident bargaining unit minority and used such status to add clout to the position he advocated, on behalf of ECOLOGY, to the Board as an employer in the climax of negotiations. Such clout was certainly not available to Holmquist in his role as citizen.

In *Pickering v. The Board of Education* (1968), 391 U.S. 563, 88 Sup. Ct. 1731, a case cited by and relied on by the Appellant, the School Board dismissed a teacher who wrote a letter to a newspaper editor which (1) attacked the Board's handling of proposals to raise new school revenues and its allocation of resources between education and athletic programs and (2) charged the district superintendent with attempting to prevent teachers from criticizing a proposed bond issue. The United States Supreme Court held that Pickering's dismissal violated his First Amendment right of free speech.

The Court held teachers may not constitutionally be compelled to relinquish First Amendment rights they otherwise enjoy as citizens

to comment on matters of public concern in connection with the operation of the schools in which they work, *at least* where the comments are in no way directed towards any person with whom the teacher would normally be in contact in the course of his daily work and where no question of maintaining discipline by immediate superiors or harmony among co-workers is presented.

This Court specifically recognized the distinction between a teacher exercising rights as part of the general citizenry and a teacher acting in the capacity of an employee when it stated:

> "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights, they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public school in which they work, it proceeds on a premise that has been unequivocally rejected in prior decisions of this Court. *At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general.* The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering v. Board of Education*, supra at 568. [Emphasis Added]

With all due respect, the Appellant misses the point this Court clearly made in *Pickering*, supra. (A.B.P. 22). The Court in *Pickering* held that a teacher is imbued with the same Constitutional rights as the rest of the citizenry. That does not mean that when a teacher steps out of the general citizen role and into the role of a labor organizer and bargaining agent and communciates with the Board as "employee"/"bargaining agent" talking to the "employer" that all labor laws and policies of the State go out the window.

Holmquist made every effort to gain status as a spokesman for members of the bargaining unit. By December 6, 1971 he had such status and used it to add impact to his presentation to the Board. Having established himself as a minority bargaining agent and acted as such, his conduct must be evaluated under the standards of labor relations law. Certainly the guise of "citizen" cannot be assumed retrospectively simply to gain the shelter of the umbrella of rights that our Constitution affords citizens. The Appellant seeks for would be dissidents the powers of collective bargaining without the corresponding restrictions of the labor laws. The powers and rights that attach in a given context must be based on an application of the law to the facts — not on an application of convenience to the facts. The best of all possible worlds is not a Constitutional right.

B. The Board of Education's role and obligations as a public employer cannot be circumvented under the guise of a public meeting.

The totality of the Board's conduct was such that it was likely to interfere with the rights of its bargaining unit employees to collectively bargain through MTI as the representative of their own choosing. First of all, the Board, through its agents, the principals, were privy to the organizational campaign of Holmquist. They allowed Holmquist to circulate anti-fair-share materials through teacher mailboxes and they saw these materials. (A. P. 120-121). Holmquist and Reed also asked for and secured permission from the building principals to circulate ECOLOGY's anti-fair-share petition to teachers in the school building and without restriction as concerns working or non-working areas. (A. P. 120). By the above conduct, the employer aided and abetted the dissident bargaining unit minority in its anti-fair-share program. In addition, the employer thereby gained actual knowledge that Holmquist was engaged in an organizational campaign aimed at scuttling the collective bargaining efforts of the majority bargaining representative. The Board was further informed of the activities of Holmquist and Reed when John Matthews, Executive Director of MTI, discussed said activities with Assistant Superintendent McGrew. (A.P. 38-39).

Moreover, Matthews and Mason discussed MTI's concern over Mr. Holmquist's intended appearance before the School Board with Board member Yelinek just prior to the Board meeting on December 6, 1971. They requested that Holmquist not be permitted to speak to the Board, showing Mr. Yelinek previous case law in support of MTI's position in regard to the propriety of Holmquist's appearance.

Finally, Mr. Holmquist's first several sentences:

> "I am another teacher. I represent an informal committee of 72 teachers in 49 schools..."

and his prefatory statement that he was going to talk about one of the "main items that will certainly be included in some form in the new package" unequivocably and explicitly revealed Holmquist's status as a minority representative and his intent to discuss a subject of collective bargaining. At the very least the Board had an obligation to stop Holmquist short at that point.

Upon Holmquist concluding his anti-fair-share proposal remarks, and knowing full well the content of his petition, since the same had just been read to them, the Board, nevertheless, indicated it would receive such petitions when they were available (A.P. 101).

Immediately after such public meeting, the Board went into executive session during which a discussion of the on-going negotiations took place. During such discussion, the Board resolved to

grant arbitration of teacher non-renewals and dismissals and to again reject MTI's fair-share proposal.

Hence, after hearing from the minority representative, the Board changed its bargaining position. A strong inference arises under such circumstances that such change occurred because the Board was fully influenced by Holmquist's minority presentation.

The facts are not in dispute. The Board's actions in this regard were likely to have only one effect — that of fully frustrating MTI in its bargaining position as well as undermining it in its role as the majority representative of a majority of the employees. Such conduct clearly interfered with the rights of bargaining unit teachers to be represented by MTI as the bargaining representative of their choice.

The employer's actions, as has been pointed out, were not merely passive interference with the right of the teachers of the bargaining unit to be represented by MTI. The toleration the employer showed toward the circulation of the petitions together with its apparent receptiveness to the presentation of Holmquist, aided and abetted Holmquist's anti-union activity. Such an interpretation of the School Board's responsibility is fully supported by precedent established pursuant to the Labor-Management Relations Act.

The Board (employer) was aware of the petition being circulated and it permitted the use of teacher

mailboxes to support the activities of the dissident minority. Finally, and most importantly, the Board listened to Holmquist's anti-MTI position and indicated a willingness to receive the petition when it became available. The Board shares responsibility for Holmquist's incursion on the legitimate collective bargaining processes relegated to the exclusive majority bargaining representative. The federal case law is clear on this point. See *Bishop and Malco, Inc.* (1966) 159 NLRB 1159, 62 LRRM 1498. *Bryan Bros. Packing Corp.* (1968) 171 NLRB No. 39, 63 LRRM 1008. *Bell Bakeries* (1952) 97 NLRB 1423, 29 LRRM 1254; and *Cherokee Sportswear, Inc.* (1969) 172 NLRB No. 40, 72 LRRM 1059.

The Board's conduct involves more than its permitting Holmquist to speak to it on fair-share, that is, more than speech activity. It involves conduct, i.e. activity which could only have for its purpose the frustration of the rights of the majority. In addition, with fair-share being a mandatory subject of bargaining, and in fact a subject of bargaining, any conduct related to the disposition of that issue would have to occur through the collective bargaining process. Participation in the collective bargaining process is governed by the labor laws of the State of Wisconsin. The Wisconsin Municipal Employment Relations Act is directed at setting the rules and shaping the guidelines for labor relations in the public sector. The School Board is regulated by the Wisconsin Municipal Employment Relations Act in

its capacity as a public employer and cannot avert such regulation merely by shifting some component(s) of its collective bargaining activities to a public forum.

C. Fair-share is a mandatory subject of bargaining that was in fact a subject of intense bargaining throughout 1971.

Municipal employees in Wisconsin have a statutory "right to collectively bargain through representatives of their own choosing." Section 111.70 (2), Wis. Stats. provides in relevant part as follows:

> "Municipal employes shall have the right of self organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection and such employes shall have the right to refrain from any and all such activities...."

A Fair-Share Agreement is defined by Section 111.70 (1) (h) Wis. Stats. as:

> '.... an agreement between a municipal employer and a labor organization under which all or any of the employes in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employes affected by said agreement and to pay the amount so deducted to the labor organization."

Such an agreement requires all, or any of the employees in a collective bargaining unit, whether members of the majority bargaining agent or not, to pay their proportionate share of the collective bargaining process and contract administration. Fair-share agreements are a type of union security arrangement and as such are a mandatory subject of collective bargaining.

> "Union security is properly a 'condition of employment', within the meaning of Sec. 9 (c) of the National Labor Relations Act and hence is within the statutory area of collective bargaining." *NLRB v. Andrew Jergens Co.* (CA 9 1949), 24:2096, enforcing 21, 1192 [24:2561] cert. denied 33 LRRM 2133. Also see *Alberto Culver Co.* 136 NLRB 1432, 50 LRRM 1026; *MFA Milling Co.* (1968), 170 NLRB No. 111, 68 LRRM 1077.

Madison Teachers Incorporated presented a fair-share proposal among its original proposals at the commencement of collective bargaining negotiations in January, 1971 for a successor collective bargaining agreement. Agreement between the parties relative to a successor agreement was reached on December 14, 1971. During the entire period of negotiations commencing on January 25, 1971 and ending on

December 14, 1971, fair-share was a subject under discussion at the bargaining table. As a matter of fact, by November 1971, negotiations had reached a stage of apparent impasse and fair-share remained as one of two major unresolved issues, along with binding arbitration of teacher non-renewals and dismissals. At about the time formal negotiations seemed at an impasse, Paul Olson, chief negotiator for the Board, during a meeting with Mr. Speerschneider, chief negotiator for Madison Teachers Incorporated, indicated that he could see no way in which the Board would grant binding arbitration for non-renewals and dismissals, but that there was a distinct possibility that the Board would concede fair-share. This off the record movement presented a possible channel for resolving the impasse. It is this critical and delicate stage of negotiations that forms the backdrop of the events that beckon the Court's scrutiny.

II. The Concept Of Exclusivity Lies At The Core Of The Majority Rule Principle In Labor-Management Relations And Has Been Endorsed By This Court As Well As The Laws Of The State Of Wisconsin As An Essential Component Of Effective Collective Bargaining.

The Appellant makes no direct issue of the majority rule principle or the exclusivity principal

in terms of their importance to labor-management relations or in terms of their constitutional validity (see Brief page 22 ff.). The Appellant, however, does engage in a collateral attack on these principles by virtue of the way in which the Appellant would have this Court apply constitutional protections guaranteed to individuals as citizens to individuals acting as collective bargaining representatives for a dissident bargaining unit minority. By ignoring the totality of the circumstances that lead up to and surround Mr. Holmquist's address and the Board's conduct and harping on misplaced constitutional issues, the Appellant is in fact attacking the viability of exclusivity and majority rule in labor-management relations with the consequent threat to the efficacy of collective bargaining itself.

A. Wisconsin law endorses the fundamental principles of majority rule and exclusivity.

The Wisconsin Supreme Court in *Board of School Directors v. WERC*, (1969), 42 Wis. (2d) 637; 168 N.W. (2d) 92 states:

> "Sec. 111.70 does not now specifically state, nor has it ever stated, that the majority union representative is the exclusive bargaining representative for all the employees. Yet, all the parties to this appeal, including the minority union, concede that it should be so interpreted

or there would be little point in having an election to determine the majority union representative."

* * * *

"It should be noted, in passing, that while this court has never specifically decided whether sec. 111.70 provides for exclusive representation, by implication the court has approved such a construction. In *Milwaukee County Dist. Council, etc. v. Wis. E.R. Bd.* (1964), 23 Wis. 2d 303, 304, 127 N.W. 2d 59, 60, 11 A.L.R. 3d 810 this court entertained an action to review the WERC's certification of the Milwaukee Garbage Collection Laborers Independent Local Union as the

"* * * *exclusive* collective bargaining representative for city employees in a particular bargaining unit ***" (Emphasis supplied.)

"The WERC's certification was approved without any comment concerning its exclusiveness. Again in *Joint School Dist. No. 8, City of Madison v. Wis. E.R. Board* (1967), 37 Wis. 2d 483, 486, 155 N.W. 2d 78, 79, this court referred to Madison Teachers, Inc., as

"*** the exclusive collective bargaining representative of the nonsupervisory teachers employed by the school ***."

"No mention was made of the exclusive nature of the representation. While it must be conceded that exclusivity was not an issue in the cases cited above, the failure to object to the WERC's construction of sec. 111.70, Stats., amounts to a tacit approval.

* * * *

"The WERC has reasonably concluded that sec. 111.70, Stats., provides for the certificate of the majority union as the exclusive bargainer. We approve of that construction."

On the basis that negotiating on behalf of the bargaining unit is an exclusive function of the exclusive bargaining agent, the Court held that a minority union cannot negotiate with the employer. It was, therefore, held that a School Board could properly deny the representative of a minority union the right to speak at a public meeting of such Board on negotiable matters and that such denial did not infringe upon the right of free speech as guaranteed by the Wisconsin Constitution. The key question in *Board of School Directors v. WERC*, supra, is whether a statement at a public meeting by a minority union representative on a question subject to collective bargaining constitutes negotiating. The Wisconsin Supreme Court answered that question affirmatively.

The Court held that a minority union has no right to negotiate with the employer, and that if the employer negotiated with the minority union, that in itself would be a prohibited practice. In a later decision the Court commented on the meaning of its *Board of School Directors* case:

"The essence of the *Board of School Directors* case was merely that, if a municipality sees fit to bargain, it must do so with the certified representative of the employees and cannot negotiate with a minority union." *La Crosse*

County Institution Employees Local 227 v. W.E.R.C. (1971), 52 Wis. (2d) 295; 190 N.W. (2d) 204.

A municipal employer is bound to deal exclusively with the majority representatives of its employees. A municipality is prohibited from negotiating with a minority union or with its bargaining unit employees individually or in groups, whether such employees are organized or not. Such violation of the exclusivity principle is destructive to the collective bargaining process.

B. Federal law endorses the fundamental principles of majority rule and exclusivity.

The right of free speech is not absolute. "Freedom of Speech" and "Freedom of Assembly" are susceptible to restriction, but only to prevent grave and immediate danger to interests which the State may legally protect. *West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624; 63 S.Ct. 1178.

Pickering v. Board of Education, supra, certainly recognizes:

> "That the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." at P. 568.

Accordingly, a fireman could be disciplined for publicly and falsely criticizing his superiors, although a citizen could not be punished for the

same speech. See *Fisher v. Walker* (10th Cir. 1972), 464 F. 2d 1147.

Not only is the government's power respecting the pure speech of its employees great, but also the government may totally suppress employee speech-conduct. Thus, a total ban could be placed on political management and political campaigning by federal employees, *U.S. Civil Service Com'n v. Letter Carriers* (1973), 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed. 2d 796, and state employees, *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830. Indeed, a city could constitutionally suspend a police officer for writing a letter to fellow officers urging support for a political candidate *Paulos v. Breier* (E.D. Wis. 1974), 371 F. Supp. 523.

In the labor relations area, the prohibition against employee negotiations other than through the majority representative serves two important governmental interests. First, the principle of majority exclusivity aids the government employee. It has long been recognized that collective unity advances the individual's interest notwithstanding he may sometimes disagree with the will of the majority. See *NLRB v. Allis-Chalmers Mfg. Co.* (1967), 388 U.S. 175, 180, 87 S.Ct. 2001, 18 L.Ed. 2d 1123.

Second, the majority principle brings stability to the employment relationship. "There cannot be two or more basic agreements applicable to workers in a given unit." H.R. Rep. No. 1147 on S. 1958, 74th Cong., 1st Sess. at 20. See *Western*

Addition Community Org. v. NLRB (Ca DC 1973), 485 F. 2d 917, 925.

To require teachers to speak to their school board employer on negotiable matters through their majority bargaining representative is not to single them out for special treatment as the Appellant would indicate. Employees in the private sector of our economy are limited in the same way. An employer in the private sector of the economy is likewise bound to deal exclusively with the majority bargaining agent. Therefore, when negotiations have been requested or are pending, an employer in the private sector may be found guilty of bad faith bargaining if it negotiates directly with its employees. *Medo Photo Supply Corp. v. NLRB* (1944), 321 U.S. 678, 64 S.Ct. 930, 14 LRRM 581.

Accurately stated, the Wisconsin Supreme Court merely held that under the Wisconsin Municipal Employment Relations Act, certified majority bargaining agents have *exclusive* negotiating rights with the employer. Holmquist or any other public employee can speak and petition to their heart's content so long as they do not intrude upon the collective bargaining or negotiating prerogatives of the exclusive majority bargaining agent. The Court properly declined to reverse the finding of fact that Holmquist's conduct constituted bargaining. The issue is the exclusivity of the collective bargaining function — a policy that has been subjected to the scrutiny of this Court and found to be constitutionally permissible. See *Medo Photo Supply Corp. v. NLRB*,

supra, and the very recent case of the *Emporium Capwell co. v. Western Addition Community Organization* (1975), 420 US 50. Certainly the same labor relations policies that are endorsed on the federal level cannot be deemed constitutionally impermissable when adopted by the states. The Wisconsin Supreme Court stated in its decision herein: "The principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts." (A.P. 189). This narrow restriction is constitutionally permissible. Such a policy has been endorsed by the federal government and the state of Wisconsin... "to avoid the dangers attendant upon relative chaos in labor-management relations." (A.P. 189).

We respectfully direct the Court's attention to *Emporium Capwell Co. v. Western Addition Community Organization*, supra.

Emporium Capwell, supra, is important because it unequivocably expresses this Court's "long and consistent adherence to the principle of exclusive representation tempered by the safeguards for the protection of minority interests." (at p. 65)

In *Emporium Capwell*, supra, this Court declined to erode the principle of exclusivity when a minority exercised, what under most circumstances are, First Amendment rights and picketed to demand that an employer bargain directly with the minority in regard to alleged racial discrimination problems in the employer's enterprise. What this Court said in that opinion is worthy of extensive quotation:

"Section 7 affirmatively guarantees employees the most basic right of industrial self-determination, "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right to refrain from these activities. These are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife "by encouraging the practice and procedure of collective bargaining." 29 U.S. C. § 151.

"Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). If the majority of a unit chooses union representation, the NLRA permits them to bargain with their employer to make union membership a condition of employment, thereby imposing their choice upon the minority. 29 U.S.C. §§ 157, 158 (a) (3). *In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority.* [Emphasis Added] *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *J.I. Case Co. v. NLRB*, 3[illegible]

U.S. 332, 338-339 (1944); H.R. Rep. No. 972, 74th Cong., 1st Sess., 18, II Leg. Hist. of the NLRA 2974 (1935). As a result, "[t]he complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)." *Emporium Capwell Co. v. Community Org.*, supra, pp. 61-62.

It should be noted that neither the fact that a First Amendment activity was involved nor the fact that the picketing wa[illegible] for the purpose of combating racial discrimination, an area of prohibited conduct ranking high in our national consciousness and of particular constitutional and statutory concern, were permitted to divert this Court's attention from the central labor relations issues that were the essence of the case and the labor relations considerations that compelled the result. In addition, the Court quoted, with approval, its previous decision n *NLRB v. Allis-Chalmers Mfg. Co.*, supra, which interpreted the NLRA § 8 (b) (1) (A) with an emphasis on national labor policy:

> "*National labor policy* has been built on the premises that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with

powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents....' *Steel v. Louisville & N.R. Co., 323 U.S. 192.* Thus *only* the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term..." 388 U.S., at 180 (footnotes omitted, Emphasis Added). *Emporium Capwell Co. v. Community Org.*, supra, at pp. 63-64.

Finally, this Court pointed out that the NLRA (it has already been noted that Wisconsin labor law is modeled after the NLRA) provides procedures for minorities to exercise or secure their rights. Minority groups have the opportunity under the law to work towards majority status or towards influencing the majority or other employees on substantive matters. Such substantive goals, however, "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA". (This would be applicable to Wisconsin's Municipal Employment Relations Act also).

In essence, Wisconsin has established a statutory framework for public sector labor-management relations similar to the NLRA. It provides for majority rule and exclusivity of bargaining agents. It also provides for protections and rights for minorities. There is nothing to stop a minority from exercising its rights to achieve a substantive aim or even to achieve majority status — so long as these are done within the framework

of the sound labor policies embodied in the statutes. Wisconsin has experienced a progressive and healthy public employment relations atmosphere by following the pattern set on the federal level. This is a monumental achievement that we should not be lulled into destroying by an ill-considered application of constitutional restrictions to the facts herein.

This Court has never found the First and Fourteenth Amendments to be a bar to majority rule and exclusivity in the collective bargaining scheme as it has evolved. No justification has been advanced for it to do so now.

C. Denying a representative of a minority of the bargaining unit employees the right to appear at a public meeting of the Board of Education and to negotiate with the Board on mandatory subjects of bargaining does not infringe upon the right of freedom of expression or the right to petition one's government, as guaranteed by the Wisconsin and United States Constitution.

The Appellant argues that Holmquist's statement is protected by the Constitutional right to petition and freedom of speech. The Appellant takes such position in the face of the clear endorsement of the principles of majority rule and exclusivity of bargaining agents by this Court and

the law at both the state and federal level. The crux of the issue, then, is whether the conduct involved herein is violative of the principle of exclusivity, i.e., whether it constitutes negotiating or bargaining. While the Appellant argues that the "majority rule" principle was never intended to prevent communication between the employer and his employees (Brief P. 26), that does not take into account that the very essence of bargaining is communication and persuasion. While the Appellant argues that the "majority rule" principle was not intended to insulate the "exclusive representative" from criticism, that does not take into account that Holmquist's primary purpose was not to criticize, but rather to achieve a collective bargaining goal by intrusion into the collective bargaining process. Holmquist specifically refrained from criticizing. The real issue here is whether it was unconstitutional for the Wisconsin Supreme Court to find that under the facts of this case, Holmquist's presentation to the Board constituted bargaining or negotiating.

The Appellant totally confuses minority and individual rights associated with "industrial democracy" with the exclusivity principle associated with collective bargaining. Industrial democracy provides for majority rule through the free selection by employees as to who, if anyone, will represent them. Once selected as the majority bargaining representative, the representative is the exclusive collective bargaining representative until such time as such representative is properly removed.

Appellant's citation of *Magnavox v. NLRB* (1974), 415 U.S. 322 as relevant to the case at bar is symptomatic of the utter confusion that permeates Appellant's argument. *Magnavox v. NLRB*, supra., involved an organizational type of communication among employees. The communication flow was from employee to employee and its restriction would affect the ability of employees to effectively exercise their rights to organize under the law. Communication between dissident minority and the employer as regards matters subject to collective bargaining stands on a different plane because it can totally undermine the exclusivity principle in collective bargaining so as to cripple the majority rule principle as well as the effectiveness of collective bargaining itself. Communication between employees is not the same as communication between dissident employees and the employer relative to matters subject to collective bargaining.

The Appellant agrees that "only Madison Teachers Incorporated, the exclusive representative of the teachers of the district, possesses the right to bargain with the Board of Education." (Appellant Brief P. 38) Similarly, MTI agrees that "all teachers employed by the Board of Education, Joint School District No. 8, possess the rights to speak freely and to petition possessed by other citizens." (Appellant Brief P. 38). The question which begs resolution, is one of fact — does the conduct complained of herein constitute an exercise of the rights of free speech and the

right of petition by a citizen before his elected officials, or does it constitute collective bargaining and/or negotiating by a collective bargaining representative for a dissident bargaining unit minority with a municipal employer? It is not a question of semantics. It is a question of realizing the fact that public bodies and individuals can occupy more than one role in our society and that conduct appropriate in one role may be inappropriate in another. If Holmquist or someone in like circumstances, wished to address the School Board as a citizen, he should have done so. Instead, he chose to organize a minority "bargaining unit" for the purpose of asserting a minority position in the collective bargaining process. The fact that he chose to organize *only* bargaining unit members demonstrates that the fair-share issue was viewed and treated as a bargaining unit issue rather than as a more generalized civic issue. Holmquist was an intruder in the collective bargaining process, engaged in "illegal procedure," rather than a citizen exercising his constitutional rights.

The Appellant argues that consistent with the National Labor Relations Act as well as Section 111.70, Wis. Stats.,

> "... public employers may listen to employees and receive information from their employees on all matters as long as the public employer refrains from evidencing an express or implied desire to deal directly with its employees and refrains from action soliciting or inducing employees to deal directly with him,..." (Brief P. 53)

Appellant cites five federal cases in support of its proposition above stated, i.e., that an employer can lawfully deal directly with his employees relative to negotiable subjects. We respectfully submit that Appellant's position is without merit and is not supported by federal cases cited by Appellant.

In three of such cases, specifically *White Sulphur Springs Company*, supra, *Coast Radio Broadcasting Corporation*, (1965), 151 NLRB 117, 58 LRRM 1574; and *American Printing Company* (1968), 173 NLRB No. 17, 69 LRRM 1238, the involved employer heard his bargaining unit employees on negotiable matters without the presence of the union or its authorized business representative. In each case the employer dealt with *all* the bargaining unit employees, and not with a dissident minority of such bargaining unit employees, but without the presence of a representative of the union. In each case, the position advanced by the involved employees was the majority position relative to such negotiable matters rather than a minority position. Further, and most importantly, in each case, there was a finding that the involved employer had not dealt directly with the bargaining unit employees without the presence of their union.

Tabasco Prestressed Concree Company, 177 NLRB (1969) 101, 71 LRRM 1565 likewise fully supports the rule that an employer cannot deal directly with individual employees in disregard of the union, rather than the premise stated by the

Appellant herein. In *Tabasco*, supra, the NLRB found the employer's conduct in explaining a proposed insurance program to two bargaining unit employees was not sufficient to violate the rule. However, when the employer went further and dealt directly with two bargaining unit employees in an attempt to persuade them to go to work for a company to which the employer had subcontracted its truck work, the NLRB quickly found a violation.

In Lawn Boy Division Outboard Marine Corporation, (1963), 143 NLRB 535, 53 LRRM 1342, upon hearing rumors that a petition was being circulated among its employees to accept management's bargaining proposal, the employer forbade the circulation of such petition during working hours. Later the employer received such petition, a fact it merely acknowledged, nothing more. The employer did not encouarge, aide or abet the employees in the circulating of their petition and the NLRB found such evidence was insufficient to support a finding that the employer violated the LMRA. Such case again fully supports the rule that an employer must deal exclusively with the majority bargaining representative. An employer cannot deal directly with a minority of its bargaining unit employees as concerns negotiable matters and the cases cited by the Appellant provide no support for a different conclusion.

To require the Board of Education to deny to the representative of the minority of its bargaining

unit employees the right to negotiate with the Board at a public meeting of the Board on negotiable matters does not infringe upon or abridge constitutional guarantees of freedom of speech.

III. The Public Policy Considerations Which Have Resulted In The Majority Rule Principle And The Exclusivity Doctrine In Labor-Management Relations Law Is At Least As Sound For The Public Sector As It Is For The Private Sector.

It is the public policy of Wisconsin to encourage the voluntary settlement of labor disputes arising in municipal employment through the procedures of collective bargaining (sec. 111.70 (6) Wis. Stats.) and accordingly, it is in the public interest that municipal employees be given an opportunity to collectively bargain with the municipal employer through a representative of their choice. The voluntary settlement of municipal labor disputes through the procedures of collective bargaining is an interest that the State may lawfully protect and in doing so it may legitimately restrict the right of dissident employees and minority bargaining representatives to speak under circumstances and as to subjects that constitute bargaining or negotiating.

The State has substantial reasons, including the voluntary settlement of labor disputes arising

in municipal employment through the procedures of collective bargaining, for establishing the enabling legislation which permits teachers to organize and to bargain collectively through the majority representative of their choice. Hence, even if Holmquist's right to negotiate freely, as representative of a dissident minority within the bargaining unit, to the employer on a mandatory subject of bargaining, was seen as being curtailed, the substantiality of the reasons advanced for doing so are sufficiently great so that such regulation is justified.

To allow the representative of a minority of the bargaining unit employees, whether formally or informally conceived, to negotiate with the School Board at a public meeting of the Board on a mandatory subject of bargaining, for the purpose of influencing the decision of the School Board on that subject is to allow conduct which can only defeat the legislative purpose of the Municipal Employment Relations Act. Wisconsin's Municipal Employment Relations Act is patterned after the National Labor Relations Act, as Appellant's brief so aptly points out in great detail. (Appellant Brief p. 27). On the other hand, to deny the minority representative such a right is only to eliminate possible infringement upon the State's legitimate interest of preserving labor peace. If minority representatives, like Holmquist, are permitted to influence the School Board employer in its decision making role on bargainable matters, the entire concept of exclusive representation is lost.

The right of the minority to speak freely on negotiable matters must be weighed against the equally important right of the majority to bargain collectively with their employer through the organization of their choice. The right of the minority to speak freely on negotiable matters must be weighed then against the majority's right to protection against unlawful conduct which is likely to result in the destruction of that majority representative as a viable and effective bargaining agent.

Freedom of Speech cannot be used as a cover for unlawful activities. Section 111.70 (3) (a) 1 Stats. prohibits an employer from interfering with the rights of his employees to collectively bargain and Section 111.70 (3) (a) 4 Stats. requires an employer to collectively bargain only with such majority representative. Freedom of Speech cannot be used as a cover to indulge in conduct which "interferes" or conduct which amounts to "a refusal to bargain." To allow the Board and Holmquist to engage in such unlawful activity under the guise of free speech would be to erode the very base of the exclusive bargaining privilege the State Legislature has seen fit to establish.

This Court is well aware of the utter threat to public health, safety and convenience occassioned by labor turmoil. It is the bedrock of experience from which our orderly processes for conducting labor management relations have emerged. The deep concern shown over the minimization of strife in the private sector is at least as appropriate to

the public sector. The practice and procedures of collective bargaining is the best method available to date to foster the peaceful settlement of labor disputes. To say that the public sector has less of a need than the private sector for preserving the integrity and viability of the collective bargaining process is to take an untenable position that disregards the realities of public sector labor relations.

Absolutely no public purpose is served by the dilution and weakening of the majority rule and exclusivity doctrines in the public sector. The encouragement of minority intrusion in the collective bargaining process only serves to make collective bargaining weaker and less effective than what is in the public interest. Everyone is well served by the majority rule and exclusivity doctrines. Employees get to organize, or not organize freely based on the wishes of the majority. Responsible union leadership is encouraged and fostered by a level of stability in the participation in the collective bargaining process. The public employer knows who the legitimate bargaining representative is and can deal more effectively with one representative than with competing minorities. The purpose of public schools is education, not free-for-all labor turmoil

It is crucial that the public schools as well as other public employers be able to carry out their public purposes without turning into arenas for protracted inter-union battles.

Once it is decided by the majority who shall govern the bargaining unit, the efficacy and legitimacy of the majority bargaining

representative should not be undermined and its efforts sabotaged by dissident minorities intruding upon collective bargaining functions. This does not mean that the exclusive bargaining representative, once elected, should be entrenched by law; it means only that said exclusive bargaining representative should retain the status of the official exclusive representative for collective bargaining until such time as it is replaced by the bargaining unit through procedures provided under the law.

The policy of divide and conquer can only lead to labor turmoil and the destruction of the collective bargaining structure. The stability of labor relations and the peaceful settlement of labor disputes is at least as crucial an interest in the public sector as we have already recognized it to be in the private sector.

CONCLUSION

This brief has dealt heavily with the facts because this case must be brought back to the facts. MTI does not seek to tamper with any of the high ideals which the Constitution was intended to realize. The fundamental freedoms are a resource to us all. However, the rights of free speech and freedom to petition simply are not threatened by the relief sought by MTI in application to the facts herein.

Denying a representative of a dissident minority of the bargaining unit employees the right to appear at a public meeting of the Board of Education and to negotiate with the Board on

mandatory subjects of bargaining does not unlawfully infringe upon the right of freedom of expression or the right to petition one's government as guaranteed by the Wisconsin and United States Constitutions.

Further, in the instant matter, the Board's conduct involved more than merely permitting Holmquist to speak to it on a mandatory subject of bargaining. It involved conduct which, in its totality, was such that it was likely to interfere with the right of its employees to bargain through MTI as the representative of their choosing. Such conduct is violative of Section 111.70 (3) 1 Wis. Stats. The law is clear. Where a majority representative has been chosen by its employees, it is incumbent upon the employer to bargain with that representative and no other.

The Appellant's position that a municipal employer is acting in conformity with its responsibilities under the NLRA and MERA "if he listens to a minority of his bargaining unit employees regarding negotiable matters, receives information, thoughts or sentiments of bargaining unit employees concerning negotiable matters or discusses negotiable matters with bargaining unit employees without the certified bargaining representative in the absence of an express or implied desire by the employer to deal directly with the employees or affirmative action soliciting or inducing employees to deal directly with him" is without merit and is contrary to well settled law. The cases cited by the Appellant simply do not support any such premise.

If the representative of the minority is permitted to influence the decision of the School Board by his argument, then he is truly "negotiating". There need be no two-sided conversation. A presentation by one party aimed at pursuading the other party to take a given position related to a matter subject to collective bargaining is in fact a component of the collective bargaining process. A position taken by one side in collective bargaining, can amount to a prohibited practice without any response from the other. It does not take two to commit a prohibited practice.

The Board's statutory duty is to deal with the majority representative in good faith and with the intention of reaching an agreement. The Board's conduct in dealing with Holmquist was entirely inconsistent with such duty.

The denial to a minority of the right to negotiate with their employer, which is speech-conduct, serves the interests of the employes and the government and does not offend free speech rights. Such a denial, in fact, is indispensable to

maintaining the integrity and viability of the majority rule and exclusivity principles, the heart and soul of the collective bargaining process. It serves the highest public interest. Madison Teachers Incorporated respectfully requests that the Judgment of the Wisconsin Supreme Court be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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ARGUMENT 1

I.

THE ARGUMENTS OF THE APPELLEE AND SUPPORTING *AMICUS* CONCEDE THE CONSTITUTIONAL IMPERFECTION OF THE ORDER AFFIRMED BY THE WISCONSIN SUPREME COURT 1

II.

THE ARGUMENT OF THE APPELLEE FAILS TO SUPPORT THE CONSTITUTIONALITY OF THE WISCONSIN SUPREME COURT HOLDING THAT A SCHOOL BOARD MUST REFUSE TO ALLOW EMPLOYEES OTHER THAN THEIR EXCLUSIVE BARGAINING REPRESENTATIVE THE OPPORTUNITY TO APPEAR AND SPEAK AT ITS REGULAR MEETINGS DURING THE PORTION OF THE MEETING DEVOTED TO PUBLIC COMMENT, SINCE TO ALLOW THE EMPLOYEE TO SPEAK WOULD MEAN THE BOARD WAS BARGAINING WITH OTHER THAN THE EXCLUSIVE REPRESENTATIVE OF ITS EMPLOYEES 5

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WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

REPLY BRIEF FOR APPELLANTS

I.

THE ARGUMENTS OF THE APPELLEE AND SUPPORTING *AMICUS* CONCEDE THE CONSTITUTIONAL IMPERFECTION OF THE ORDER AFFIRMED BY THE WISCONSIN SUPREME COURT.

The Appellee argues on Page 16 of its Brief:

> "If Holmquist had appeared before the Board and expressed his views regarding fair share or any other topic in his capacity as a citizen, rather than as a teacher and collective bargaining representative representing a dissident bargaining unit minority, he would certainly have been acting within his constitutional rights and without litigious consequences."

The problem with this argument is that the WERC order affirmed by the Wisconsin Supreme Court demands that the Appellant cease and desist from permitting *employees* other than representatives of Madison Teachers Incorporated to appear and speak on matters subject to collective bargaining between it and Madison Teachers Incorporated. Thus, the Board must refuse to allow *employees* the opportunity to appear and speak, even though the employee wished to, or would have, expressed his views in the capacity of a citizen, and therefore "would certainly have been acting within his constitutional rights." (Appellee's brief P. 16). It follows that the Appellee has at least tacitly conceded that the WERC order affirmed by the Wisconsin Supreme Court is unconstitutionally overbroad on its face.

The *amicus curiae* brief filed on behalf of the Appellee by the National Education Association (hereinafter NEA) also concedes the constitutional imperfection of the order affirmed by the Wisconsin Supreme Court. The NEA, in its brief, at Page 18, makes the following comment regarding the WERC order:

> "Unless the order is narrowed, however, the School Board will have no choice but to comply with its terms and refuse at any meeting to accept statements on subjects of collective bargaining from employees other than the Union representative. If the First Amendment requires equal access under any conceivable circumstances, this order will be unconstitutionally overbroad and will have the effect of denying legitimate opportunities to speak along with those that may be properly denied."

The brief filed in behalf of the Appellee by the American Federation of Labor and Congress of Industrial Organizations, (hereinafter AFL-CIO) speaks quite pointedly regarding the order affirmed by the Wisconsin Supreme Court and effectively summarizes the argument of the Appellant regarding the order. On Page 25 of their brief, the AFL-CIO *amicus* concludes ... "this order is palpably unconstitutional."

The Appellant contended in its initial brief that the order must be voided as constitutionally vague, since the prohibited subject matters are not clearly defined. Simply, a school board would have difficulty in locating the outer limits of the term, "matters subject to collective bargaining" when determining whether a speech was permissible or impermissible. The Wisconsin Supreme Court recently has addressed the issue of a definition of the term, "matters subject to collective bargaining". *Beloit Education Association v. WERC*, 73 Wis. 2d 43, 242 N.W. 2d 231 (1976). The decision recognizes the imprecise

nature of the term and thereby confirms the vagueness of the WERC order and insures that the order will have a chilling effect both on the rights of teachers to speak and school boards to listen on subjects arguably related to bargaining but directly concerned with the well-being of school children in the community.

Finally, the constitutional difficulties of the WERC order identified in the Appellant's brief, tacitly recognized by the Appellees and affirmatively recognized by *amicus* filing in behalf of the Appellee, have recently again been condemned by this Court. *Hudgens v. NLRB*, — U.S. —, 96 S.Ct. 1029 (1976) (content consorship in a public forum). *Nebraska Press Association v. Stuart*, — U.S. —, 96 S.Ct. 2791 (1976) (prior restraints on speech and publication as the most serious and least tolerable infringement of First Amendment rights). *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, — U.S. —, 96 S.Ct. 1817 (1976) (where a willing speaker exists, the First Amendment protection afforded is to the communication, to its source and to its recipients).

II.

THE ARGUMENT OF THE APPELLEES FAILS TO SUPPORT THE CONSTITUTIONALITY OF THE WISCONSIN SUPREME COURT HOLDING THAT A SCHOOL BOARD MUST REFUSE TO ALLOW EMPLOYEES OTHER THAN THEIR EXCLUSIVE BARGAINING REPRESENTATIVE THE OPPORTUNITY TO APPEAR AND SPEAK AT ITS REGULAR MEETINGS DURING THE PORTION OF THE MEETING DEVOTED TO PUBLIC COMMENT, SINCE TO ALLOW THE EMPLOYEE TO SPEAK WOULD MEAN THE BOARD WAS BARGAINING WITH OTHER THAN THE EXCLUSIVE REPRESENTATIVE OF ITS EMPLOYEES.

The Appellant has conceded in its initial brief that the right of free speech is not absolute. The Appellant has also conceded that the state has interests as an employer in regulating the speech of its employees that differs significantly from those that it possesses in conjunction with regulation of the speech of the citizenry in general. *Pickering v. Board of Education*, 391 U.S. 563 (1968). It is important, however, to clarify what was said and what was not said in *Pickering* regarding the interests of the state as an employer. A public employee, like a private sector employee,

may be discharged or disciplined in some cases for publicly criticizing his superior. If *Pickering* were such a case, the teacher's discharge could have been upheld. 391 U.S. at 569-570. See also *Fisher v. Walker,* 464 F. 2d 1147 (10th Cir. 1972). In other words, the First Amendment provides no special immunity for public sector employees against discipline by their superiors for sufficient cause. Further, public sector employees have no special Fourteenth Amendment rights from being discharged by their employer simply because their employer is an agent of the state. *Bishop v. Wood,* — U.S. —, 96 S.Ct. 2074 (1976), *Kelley v. Johnson,* — U.S. —, 96 S.Ct. 1440 (1976). So, while public employees, like private employees, may be disciplined for certain types of speech or conduct, *Pickering* emphatically reiterates that they may not be compelled to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public institutions in which they work. (See Brief for AFL-CIO as *amicus curiae,* P. 5.)

The labor relations area is also an area where the state has interests as an employer in regulating the speech of its employees. The Appellant has conceded that the prohibition against employers negotiating with other than the majority representative of its employees in a case where the employees have decided to organize is constitutional. The constitutional problem posed in this case occurs because the Wisconsin Supreme Court has defined, interpreted, and applied the

term "negotiation" to include merely allowing employees to speak at public meetings during the portion of the meeting devoted to public comment. It is the Appellant's position that this definition, interpretation and application of the term of negotiation is well beyond the permissible infringement of freedom of expression allowable pursuant to the labor relations principle of majority rule.

The Appellee has failed to cite any case which suggests that the Wisconsin Supreme Court definition of negotiations coincides with the permissible scope of First Amendment infringement allowed by the majority rule doctrine of labor-management relations.

The Appellant's initial brief discussed the case of *Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678 (1944), and pointed out how that case was supportive of the Appellant's contention that bargaining or negotiating entailed much more than an employer merely listening to a speech of an employee. The Appellee cites the case but totally disregards the critical importance of the facts of that case as they define and illuminate the scope of the exclusivity doctrine, and specifically the type of direct dealing which constitutes impermissible negotiation with employees other than the exclusive representative. Therefore, the Appellant continues in its firm belief that the *Medo* case when viewed in the light of its facts supports the position of the Appellant.

The Appellee also contends that the case of *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50 (1975), supports the holding of the Wisconsin Supreme Court. The Appellant respectfully submits the Appellee is in error. In the *Emporium* case a group of employees refused to pursue claims of racial discrimination through the grievance-arbitration process established in the governing collective bargaining agreement. Instead, minority group employees picketed and organized a boycott of the employer in support of their "*demand that the* [*company*] *bargain with the picketing employees for the entire group of minority employees*". *Emporium,* supra, 420 U.S. at 57. (Emphasis supplied). The employer warned the group to cease and desist from their activities, and when the group continued, the employer discharged the employees.

The employees sought reinstatement claiming their discharge by the employer violated Section 8 (a) 1 of the National Labor Relations Act. The NLRB Hearing Examiner determined that the activity of the employees was not protected by Section 7 of the Act (29 USC §157), and that their discharge did not violate Section 8 (a) 1, (29 USC §158 (a) 1). The NLRB concluded that the protection of such an attempt to bargain by minority employees would undermine the statutory system of bargaining through an exclusive elected representative, impede the elected union's efforts at bettering working conditions of minorities, and

place on the employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under the agreement.

This Court, in deciding the *Emporium* case, emphasized that: "... It is important to have firmly in mind the character of the underlying conduct ..." involved in the case before applying labor policy. (*Emporium,* supra, 420 U.S. at 60). The Court determined that the issue was "... whether such attempts to engage in separate bargaining are protected by Section 7 of the Act or prescribed by Section 9 (a) (29 USC §159 (a))..." (*Emporium,* supra, 420 U.S. 61). This Court held such attempts were not protected and refused to set aside the employees' discharges.

The character of the underlying conduct in the case at bar clearly cannot be characterized as an attempt to engage in separate bargaining. Albert Holmquist's statement to the Board of Education recognized the validity and viability of the collective bargaining relationship between the Board and MTI. In fact, the Collective Bargaining Agreement recognized that the parties may receive petitions on negotiable subjects and specified a procedure for dealing with such a situation. (Appellant's Brief P. 6).

The *Emporium* case stands for the proposition that an employee demand that an employer bagain separately was not protected by the National Labor Relations Act. However, the Court did not hold that the employer was guilty of an unfair labor practice if he failed to take disciplinary action against an employee who made such a bargaining demand, but instead merely listened to such demand and remained silent. Yet Appellee is contending that that case supports the proposition that an employer is guilty of an unfair labor practice if the Board fails to prevent an employee from speaking to it on a matter subject to collective bargaining in the absence of the slightest evidence that the employee wished to bargain with the Board separately. The Appellant submits a comparison of the character of the underlying conduct in *Emporium* to that in the case at bar reveals that *Emporium* lends no support to the constitutionality of the Wisconsin Supreme Court decision.

Finally, the Appellee cites four NLRB cases to establish that an employer is responsible for the conduct of his employees. (*Bishop and Malco, Inc.* (1966) 159 NLRB No. 106, 62 LRRM 1498. *Byran Bros. Packing Corp.* (1968) 161 NLRB No. 107, 63 LRRM 1468. *Bell Bakeries* (1951) 97 NLRB No. 233, 29 LRRM 1254. *Cherokee Sportswear, Inc.* (1969) 172 NLRB No. 40, 72 LRRM 1059. See Appellee's Brief P. 23). The Appellant submits that these cases, when viewed in the light of their facts, also lend no support to the conclusion that the Appellant aided and abetted or was otherwise responsible for Albert Holmquist's activity.

A careful review of Appellee's Brief fails to reveal any case authority to support the constitutional validity of the Wisconsin Supreme Court's definition of negotiations. Instead the cases cited illustrate and highlight the dubious nature of the Wisconsin court's definition and hence its constitutional imperfection.

III.

THE DECISION OF THE WISCONSIN SUPREME COURT MUST BE REVERSED.

The Wisconsin Supreme Court has held that if a public body allows an employee other than the exclusive bargaining representative of its employees to speak at a public meeting on matters subject to collective bargaining, it commits a prohibited labor practice because it has negotiated with that employee in derogation of the employees' exclusive representative. The court expressly found no constitutional infirmity with such a definition of negotiation. The constitutional issue posed by this definition is squarely before the Court. The unfair labor practice is founded solely and squarely on the Board's permitting a teacher to speak at a public meeting. Yet the *amicus* briefs filed on behalf of the Appellee suggest that the matter be remanded to the Wisconsin Supreme Court for further proceedings.

However, the cases cited in the NEA *amicus* brief suggesting remand clearly demonstrate that a remand for further proceedings is inappropriate. The record in this case leaves no uncertainty as to

whether the court passed on Appellant's constitutional claim as was the case in *Blackburn v. Alabama*, 354 U.S. 393 (1957). The record in this case unlike the record in *Missouri ex rel. Southern Railway v. Mayfield*, 340 U.S. 1 (1950), clearly establishes the basis of the Wisconsin Supreme Court decision. The record in this case clearly establishes that the decision of the Wisconsin Supreme Court does not rest on a valid non-Federal ground, and thus, subject to remand under the theory of *Young v. Raegen*, 337 U.S. 235 (1949). In this case, the Wisconsin Supreme Court has accomplished and completed a construction of the state labor law unlike the cases of *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942) or *State Tax Commission v. Van Cott*, 306 U.S. 511 (1939), so that this Court can and should determine whether the statute so construed and applied is repugnant to the Federal Constitution. The Wisconsin Supreme Court judgment is clear and unambiguous, and therefore appropriate for a dissertation on constitutional law unlike the record and decision in *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940). Finally, the record clearly shows the nature of the Federal question, how it was raised, and the grounds of its disposition, unlike the case of *Honeyman v. Hanan*, 300 U.S. 14 (1937). It follows that a remand of this case to the Wisconsin Supreme Court is not justified by any of the cases cited in the *amicus* brief filed by the NEA in behalf of Appellee.

Further, none of the cases cited in support of the remand request are cases involving free expression. This Court has accorded cases involving free expression a preferred place because of the core importance of free expression to the maintenance of our democratic system of government.

> "The Court has often recognized that in cases involving free expression we have the obligation, not only to formulate principles of general application, but also to review the facts to insure that speech involved is not protected under federal law. We must 'make an independent examination of the whole record, '... so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *National Association of Letter Carriers v. Austin*, 418 U.S. 264 at 282 (1971) [Citations omitted].

Appellant submits that the record before this Court and the decision of the Wisconsin Supreme Court provides a sound basis for this Court to formulate principles of general application regarding the impact of the Wisconsin decision on our system of free expression so that this Court can assure itself that future judgments regarding the public sector labor relations environment will not constitute a forbidden intrusion in the field of free expression.

CONCLUSION

It appears that all parties and *amicus* who have filed briefs in this case for the Court's consideration concede that the order affirmed by the Wisconsin Supreme Court cannot stand. It is also clear that the argument of the Appellee fails to indict the primary contention of the Appellant that the Wisconsin Supreme Court definition of negotiation unconstitutionally intrudes on the rights guaranteed individuals and obligations imposed on governmental bodies by the First Amendment.

The posture of this case as currently before the Court, demands formulation of principles of general application so as to assure the judgments of the Wisconsin Supreme Court in the future will not constitute a forbidden intrusion on the field of free expression.

The Appellant respectfully suggests that a sound starting point for developing the principles of general application in the public sector labor relations environment will be the recognition that a public employer must be able to listen to any of its employees at public meetings open to public comment without having to be concerned that to do so would violate his duty to bargain solely with the employees' exclusive representative. It is the firm belief of the Appellant that establishment of such a principle is the only result which will promote sound public sector employment relations and preserve "free and unhindered debate on matters of

public importance — the core value of the Free Speech Clause of the First Amendment...." *Pickering v. Board of Education*, supra, 391 U.S. at 573.

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CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8,
CITY OF MADISON, VILLAGES OF MAPLE BLUFF
AND SHOREWOOD HILLS, TOWNS OF MADISON,
BLOOMING GROVE, FITCHBURG AND BURKE
AND ITS AGENT THE BOARD OF EDUCATION,
CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
AND MADISON TEACHERS INCORPORATED,

Appellees.

On Appeal from the Supreme Court of the State of Wisconsin

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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Supreme Court of the United States

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed on behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 111 national and international unions having a total membership of approximately 14,000,000 men and women, with the consent of the parties as provided for in Rule 42(2) of this Court's Rules. Forty AFL-CIO unions bargain collectively in the public sector on behalf of approximately 3,000,000 public employees.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Wisconsin Supreme Court analyzed the constitutional issue which this Court has agreed to review in this case as follows:

> "The United States and Wisconsin Constitutions protect the rights of indivduals to speak and to petition their federal and state governments. But it is well established that these freedoms are not absolute * * *. The principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts; the First Amendment rights of those persons are to that extent infringed. But the gravity of that evil was considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations * * *. Now the question is whether [Mr. Holmquist's statement at the school board meeting] qualifies as bargaining and can, therefore, be restricted." (App. 188, 189,-190).

The appellants, and the various *amici curiae* appearing on their behalf, quite understandably have accepted this basic framework and proceeded to deal primarily with the last link alone: they maintain that, contrary to the Wisconsin Supreme Court's conclusions, Mr. Holmquist's statement of position at the School Board meeting, and the response thereto, cannot fairly be characterized as negotiating, or that the state interest in maintaining stable labor relations cannot override Mr. Holmquist's First Amendment rights. (See, e.g., Br. for Appellants at 35 et seq.; Br. on behalf of the Chamber of Commerce, at 4, 13, 15, 17 et seq.; Br. on behalf of the United States Conference of Mayors, at 23-27; Br. for National Right to Work Legal Defense Foundation, at 17-19, 19-21.)

We agree that if First Amendment rights are indeed at stake, the Wisconsin Supreme Court's conclusion that Mr. Holmquist's presentation was "bargaining" cannot end the constitutional inquiry, even if that Court's premises are accepted. (See, e.g., *NAACP v. Button,* 371 U.S. 415, 429.) And, we agree as well that significant First Amendment questions are raised by the holding that the School Board's allowing Mr. Holmquist to speak at a meeting open for expression to any citizen upon any subject relating to the schools constituted an unfair labor practice and, particularly, by the order issued by the Wisconsin Employment Relations Commission ("WERC"). (See Part III, *infra.*)

But, we do not agree that the questions posed can be sensibly resolved so long as the Wisconsin Supreme Court's assumption that because "the principle of exclusivity, by definition, forbids certain individuals from speaking certain context. * * * the First Amendment rights of those persons are to that extent infringed" (App. 189)[1] is left

---

[1] Certain of the brief submitted in support of appellant's position state this assumption in even more sweeping terms, albeit with no more citation of authority. For example, one *amicus curiae* speaks of the "constitutional right [of public employees] to speak to their employer." (Br. for the Chamber of Commerce, at 20.) Another asserts that "Mr. Holmquist's appearance before and presentation to the Board of Education was the exercise of a right guaranteed by the First and Fourteenth Amendments." (Br. of the National Right to Work Legal Defense Foundation, at 9.) And, a third asserts that "any public interest in regulating labor relations must yield when such regulations restrict the right of individuals to address the government." (Br. of Wisconsin Association of School Boards, at 19.)

unchallenged. For this assumption, as we shall endeavor to show, is demonstrably false: the First Amendment does not grant citizens at large—or public employees in particular—a right of access to participate in the business meetings of government bodies. That, however, is not the end of the matter. As *Niemotko* v. *Maryland*, 340 U.S. 268, *Fowler* v. *Rhode Island*, 345 U.S. 67, and *Police Department* v. *Mosley*, 408 U.S. 92, demonstrate, once a state has determined to open a meeting of a government body to expressions of public opinion generally, *then* to distinguish among speakers on the basis of their viewpoint or their identity does implicate the "First Amendment/Equal Protection intersection" (*Mosley, supra*, 408 U.S. at 95 n. 3), and calls at least for a compelling state interest other than an interest in suppressing certain views to justify any denial of the permission to speak where that denial is other than the application of reasonable procedural rules. Applying this standard, the order approved by the Wisconsin Supreme Court cannot stand, and its conclusion that permitting Mr. Holmquist to speak was, without more, an unfair labor practice must fall as well. However, since it would on analysis be constitutional to declare an unfair labor practice if the permission to speak was part of a larger course of conduct by the School Board contrary to state labor policy, or to interpret state law so as to limit a public meeting agenda by excluding matters then in negotiation, the case should be remanded to the Wisconsin Supreme Court for decision in light of proper constitutional principles.

ARGUMENT

I

THE FIRST AMENDMENT DOES NOT GRANT CITIZENS GENERALLY, OR PUBLIC EMPLOYEES PARTICULARLY, A RIGHT OF ACCESS TO OR PARTICIPATION IN GOVERNMENT BUSINESS MEETINGS.

A. *Public employees and the First Amendment*

Before embarking upon a discussion of the First Amendment questions here, it may prove helpful to state briefly the lack of significance we see in the fact that the individual on whose behalf those questions are being raised[2] is a public employee. "Except when the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees is overriding, teachers [and other public employees] may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment upon matters of public interest in connection with the operation of the public schools [or other government body] in which they work." (*Pickering* v. *Board of Education*,

[2] It is of some relevance to our later analysis that while, because of the circumstances here, the School Board does have standing to assert the First Amendment rights of its employees (see, e.g., *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Singleton* v. *Wulff*, ... U.S. ....., 44 U.S.L.Wk. 5213, 5216) the Board has no First Amendment rights of its own entitled to recognition. Private citizens, to be sure, have a First Amendment right to receive information separate from that of the willing speaker or writer. (*Virginia Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, ... U.S. ....., 44 U.S.L.Wk. 4688.) But the basic purpose of the First Amendment is to prevent government encroachment upon *private* rights. Therefore, a subordinate governmental body cannot assert a right to receive information when the state legislature has determined the state interest to lie in *not* permitting direct citizen participation in that body's business meetings.

391 U.S. 563, 568.) This very statement of the principle that a public employee cannot ordinarily be compelled to relinquish rights he or she would otherwise enjoy as a condition of employment carries within itself an obverse principle: that a public employee does not *gain* any constitutional rights by virtue of his public employment. Thus, the First Amendment rights of public employees with regard to access to and participation in meetings of official bodies are at least not greater and may in limited circumstances be less than those enjoyed by citizens generally who have an interest in influencing a pending decision. (Cf., e.g., *Kelley* v. *Johnson*, —U.S. —, 44 U.S.L Wk. 4469.)

This principle, obvious though it may be, serves to illuminate the present case. For, to suggest that a teacher necessarily has a constitutional right to insist upon speaking directly to the school board upon a labor agreement under consideration, which right can be abridged only if the state interest in not hearing his views is compelling, is necessarily to suggest that every governmental body and official must support with a justification sufficient to subordinate a First Amendment right every determination to refuse to listen to the views of each interested citizen on each decision it makes.[3]

[3] The question of whether public hearings on questions of general importance are wise and ought to be legislatively commanded is, of course, an entirely separate matter. For example, certain federal statutes mandate hearings at which all interested citizens have a right to appear before a final decision can be reached on specific matters. (See, e.g., 23 U.S.C. § 128(a) (requiring a public hearing on Federal-aid highway projects). Cf. *Lathan* v. *Binegar*, 506 F.2d 677 (C.A. 9).) But such a hearing is not required by federal law whenever an agency engages in rulemaking which may affect individuals. (*United States* v. *Florida East Coast Rwy.*, 410 U.S. 224; *United States* v. *Allegheny Ludlum Steel Corp.*, 406 U.S. 742.) Congress is now considering legislation which would require most meetings of many federal agencies to be held in public, although participation by attending citizens would not necessarily be permitted. (See 122 Cong. Rec. H7863-H7902 (Daily Ed., July 28, 1976) (debate in the House of Representatives and passage of H.R. 11656, The Government in the Sunshine Act).) Wisconsin has already passed similar legislation, which has been interpreted to permit public comment upon public employee collective bargaining agreements once a tentative decision has been reached and bfore final adoption. (Wis. Stat § 66.77(c) (Supp. 1975); *Board of School Directors* v. *Wisconsin Employment Relations Commission*, 42 Wis. 2d 637, 168 N.W.2d 29 (1969).) The fact that both Congress and the state legislatures are now mandating more public access to government decision-making surely does not suggest that the direct right of access to government business meetings has a constitutional underpinning; if anything, it indicates the contrary.

Further, when the government proposes to take action against particular individuals, entirely separate constitutional protections—the Fifth and Fourteenth Amendment due process rights—sometimes compel an opportunity for an individual to present his views personally to a decision-maker. (See, e.g., *Goldberg* v. *Kelly*, 397 U.S. 254; *Arnett* v. *Kennedy*, 416 U.S. 134, 164 (Powell, J., concurring); *id.* at 172 (White, J., concurring).) No due process right has been asserted in this case, however; nor, so long as the requirements of the bill of attainder clause are observed, may due process rights be asserted on the ground that a legislative decision has been made without affected citizens being afforded a right to be heard. (*Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441.) Indeed, if the First Amendment commanded that the government provide an oral hearing to any citizen interested in its decisions, such persons could not be, as they have been heretofore, required to demonstrate both a deprivation of an interest in life, liberty or property and the necessity of an oral hearing to fair decision-making in the particular circumstances. (See, e.g., *Bishop* v. *Wood*, ... U.S. ....., 44 U.S.L.Wk. 4820; *Mathews* v. *Eldridge*, ... U.S. ....., 44 U.S.L.Wk. 4224; *Gerstein* v. *Pugh*, 420 U.S. 103.)

B. *Free speech and government meetings*

The question, then, is whether there is any heretofore undiscovered First Amendment right of citizens generally to speak directly to governmental bodies considering issues in which those citizens have an interest.[4] While this Court has never directly confronted this question, it has taken it to be true, in the words of Mr. Justice Holmes, that the "Constitution does not require all public acts to be done in town meeting or an assembly of the whole" (*Bi-Metallic Investment Co., supra,* 239 U.S. at 445); that "entry into the White House [is not] a First Amendment right" (*Zemel* v. *Rusk,* 381 U.S. 1, 17); and that this Court's "own conferences [and] the meetings of other official bodies gathered in executive session" may be closed to the public without implicating any constitutional rights whatever (*Branzburg* v. *Hayes,* 408 U.S. 665, 684. Cf. *Nebraska Press Ass'n.* v. *Stuart,* — U.S. —, —, 44 U.S.L. Wk. 51, 5165-5166, n. 21 (Brennan, J., concurring)).[5]

The basis for this understanding is simply stated. We begin with the premise that the First Amendment does not

[4] The right of citizens to use methods of communicating with government bodies other than direct oral speech is not involved in this case. As the WERC noted, Mr. Holmquist "could properly have presented his petition to the Board by means other than an appearance at an open Board meeting." (A-162.) (See *Pell* v. *Procunier,* 417 U.S. 817, 828, n. 6.)

[5] Since the Sixth Amendment protects the right to a "public trial," attempts to exclude citizens from attendance upon criminal trial court proceedings present special problems. (See *Nebraska Press Ass'n., supra,* 44 U.S.L.Wk. at 5160 (Brennan, J., concurring).) But, of course, it has never been suggested in that context that the attending members of the public have a right to participate in the trial.

command "that people who want to [present their] views have a constitutional right to do so whenever and however and wherever they please." (*Adderley* v. *Florida,* 385 U.S. 39, 48. Cf. *Cox* v. *Louisiana,* 379 U.S. 536, 544-55.) For, "[i]t is of course commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." (*Hudgens* v. *NLRB,* — U.S. —, 44 U.S.L. Wk. 4281, 4283. See *CBS* v. *Democratic National Committee,* 412 U.S. 94.) And, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." (*Adderley, supra,* 385 U.S. at 47. See also *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 302-303 (plurality opinion); *id.* at 312 (Brennan, J., dissenting); *Greer* v. *Spock,* — U.S. —, 44 U.S.L. Wk. 4380, 4383; *id.* at 4390 (Brennan, J., dissenting).) Thus, while certain publicly owned areas such as streets and parks are presumptively areas in which free expression is protected (*Hague* v. *CIO,* 307 U.S. 496, 515-516), the Constitution does not mandate that public ownship *alone* converts an area into a location to which access for purposes of expression is ordinarily protected. (*Lehman, supra; Greer, supra.*) Nor does the fact that members of the public are freely admitted to an area under government control for certain purposes mandate that *any* attempt to regulate expression in such areas must be shown to be necessary to an overriding state interest separate from any asserted interest in limiting communication. (*Lehman, supra; Greer, supra.*)

A survey of the few cases involving claimed protection of the First Amendment for activity *inside* a public building is instructive, for those cases indicate that the First Amendment does *not* embrace an access right to the inter-

nal workings of the government. (See *Tinker* v. *Des Moines School District*, 393 U.S. 503; *Southeastern Promotions* v. *Conrad*, 420 U.S. 546. Cf. *Brown* v. *Louisiana*, 383 U.S. 131, 142 (plurality opinion); *id.* at 145-147 (Brennan, J., concurring).) In *Southeastern Promotions*, the building involved was "designed for and dedicated to expressive activities" (420 U.S. at 555); in both *Tinker* and *Brown*, those asserting First Amendment claims had a right to be inside the building for certain purposes, other than the expression of views (393 U.S. at 512, n. 3),[6] and the protected activity in which they engaged was specifically found to be compatible with the purposes to which the building was otherwise dedicated. (Interestingly, in neither *Tinker* nor *Brown* did the protected activity involve speaking any words; and in both cases, it is quite possible that certain forms of verbal speech would have been found incompatible with the location and therefore permissibly banned.) Thus, the conclusion in these three cases that valid First Amendment claims were asserted stemmed from the principle that "[T]he truth is that * * * public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular

[6] For example, it seems clear that the *Tinker* case would have presented entirely different problems if persons who were neither employees nor students in the school had desired to walk the school halls with black armbands, even though the school had a rule, which it enforced, permitting only students and employees to use the corridors during school hours. Similarly, if it had been shown in *Brown* that only residents of the area served by the library were permitted to use the library, we would expect that the non-residents could be excluded even if their purpose in seeking entry was to protest segregation.

place." (*M'Ara* v. *Magistrates of Edinburgh* [1913] Sess. Cas. 1059, 1073-74; quoted in *Lehman, supra*, 418 U.S. at 302.)

This case does not, of course, involve directly the question of access to a government-controlled location. And, we are not aware of *any* decision of this Court dealing in the First Amendment context with the right of access to meetings of public officials rather than public places or, indeed, with access to government-controlled occasions or events rather than locations. But, we submit that the same principles govern: just as the government is not obliged by the Constitution to dedicate every publicly owned location even those open to citizens generally as a forum for speech, so it is not obliged by the Constitution to create a forum for speech by holding public meetings or admitting interested citizens to business meetings.

C. *The right to petition and government meetings*

The briefs urging reversal suggest that even if the free speech guarantee does not embrace a right to speak to govrnment bodies, the additional First Amendment guarantee of the right to petition the government may do so. We point out, first, that the implications of such a holding would be far reaching. For example, it seems clear in the present context that if the petition right included a right to insist upon speaking to a school board, this right could be exercised through a representative as well as personally. (See, e.g., *NAACP* v. *Button, supra; United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 223.) Therefore, recognition of such a right would in essence hold the right to bargain collectively through a labor organization to be a constitutional guarantee rather than, as heretofore

assumed, a right granted only if the government agrees to engage in such bargaining with its employees through their chosen representative. (See, e.g., *Indianapolis Education Ass'n.* v. *Lewaller*, 72 LRRM 2071 (7th Cir., 1969);[7] *Hanover Township Federation of Teachers, Local 1954* v. *Hanover Community School Corp.*, 457 F.2d 456 (7th Cir., 1972) (Stevens, J.).)

The very language used in the First Amendment with regard to the right to communicate with the government—"petition for redress of grievances"—suggests that the right involved is *not* the right to command a personal audience, or to compel a discussion. Even those members of the Court disposed most expansively to read the petition guarantee have recognized that:

> "Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials." (*Adderley, supra*, 385 U.S. at 50 (Douglas, J., dissenting).)[8]

Similarly, in cases in which the petition right was suggested to have an impact perhaps broader than that which the free speech right alone would protect, the right asserted

[7] "There is no constitutional duty to bargain collectively with an exclusive bargaining agent. Such duty, when imposed, is imposed by statute." (*Id.* at 2072.)

[8] See, also, for a brief historical inquiry into the petition right, consistent with this analysis, *id.* at 49, n. 2.

was always the opportunity to use methods of communication or procedures otherwise available, not special accesss otherwise unavailable to speak directly to a government body.[9] (See, e.g., *NAACP* v. *Button, supra; Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127; *Boddie* v. *Connecticut*, 401 U.S. 371; *Pell* v. *Procunier, supra.*)

The suggestion th the petition right encompasses a right of direct access to and participation in government business meetings is not only without precedent, it is without logic. "Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. * * * There must be a limit to individual argument in such matters if government is to go on." (*Bi-Metallic Investment Co., supra*, 239 U.S. at 445.)[10] The government could be brought to a halt entirely were officials precluded from reaching any decision without hearing in person the views of, or discussing its implications with, interested citizens desiring to participate. Time alone dictates that governmental bodies and officials cannot

[9] In *Emporium Capwell Co.* v. *WACO*, 420 U.S. 50, 61, n. 12, this Court construed the language in § 9(a) of the National Labor Relations Act, protecting "the right * * * to present grievances" to an employer (29 U.S.C. § 159(a)) that parallels the First Amendment's petition right. (See *Hearings Before the Committee on Education and Labor* on S. 2926, 73rd Cong., 2d Sess. 273 (1934) (Statement by E. Witte).) The Court in *Emporium* commented that the § 9(a) statutory right does not "[make] it an unfair labor practice for an employer to refuse to entertain such a presentation."

[10] Mr. Justice Holmes added that the rights of individuals affected by government action "are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." (*Id.*)

grant an audience to all interested citizens, or justify every exclusion with a well-tailored, compelling justification.

It will not suffice to suggest that the government can limit access to its business meetings by analogy to the "time, place and manner" cases (e.g., *Cox* v. *New Hampshire*, 312 U.S. 569; *Poulos* v. *New Hampshire*, 345 U.S. 395; *Cox* v. *Louisiana*, *supra*, 379 U.S. at 554-555), as long as it does so without reference to the views or identity of the person seeking access. Effective government, given time restraints particularly, necessarily requires that governmental bodies judge their own informational needs, within statutory constraints, and not be required to hear, for example, the first five people who show up on a given day, regardless of whether those individuals have any particular expertise, represent a group or only themselves, or wish to address an issue currently under consideration or one not on the body's schedule at the time.

The discriminations necessary in running the everyday business of a government often *are* content- or identity-based and properly so: a government body may want to discuss its budget with Citizen A because he is a financial expert but not with Citizen B, because he is not; it may agree to meet with persons opposing a present policy, but not feel it has time to hear a person supporting that policy, since it is quite aware of the arguments for continuance of the *status quo* but not fully informed of the problems that have been engendered.[11] The First Amendment

[11] This Court's exercise of its certiorari jurisdiction is illustrative. The Court decides whether or not to hear orally a certain case precisely because of its content—the importance assigned to the issues raised. And, it has never been suggested that the identity

should not, therefore, be stretched out of shape to deny government the discretion within the limits of applicable statutes to consult directly with Citizen A, but not Citizen B without the inhibition of having to consider whether there is a compelling reason not to listen to B. (Cf. *Lehman, supra; Greer, supra.*) [12]

of the litigants is an impermissible consideration, at least in the sense that a case with an impact on a given person, organization or business entity may have a social impact for that reason alone, regardless of the abstract importance of the issues. (Cf. *United States* v. *Nixon*, 418 U.S. 683.) Finally, while this Court ordinarily does not grant certiorari merely because a case has been wrongly decided, there is no question that it may do so, even if it has not heard other cases raising the same question because it agreed with the decisions below; thus, whether or not a party is heard orally can depend upon which side of an issue he is on. All of these decisions are made without affording the litigants an opportunity to present their case in person.

[12] We emphasize that just as this case raises no question regarding communication by means other than directly addressing a government body, see n. 4, *supra*, our analysis is also limited to that context. For example, attempts to punish mail communication with a government body or official would raise serious First Amendment petition problems, since that Amendment appears at least to protect *attempts* to gain access and consideration even though it does not command the government to listen. Once again, an example from this Court's procedures may be illustrative: Congress can, and has, mandated that this Court hear only some of the cases presented to it for consideration and has, as regards most cases, granted this Court wide discretion in determining which cases to hear. And, this Court may—indeed must—refuse even to consider certain cases for hearing, if procedural and jurisdictional prerequisites are not met. But surely to suggest that Congress could in addition preclude certain citizens from even presenting a written petition for consideration *whether* they are to be heard and *whether* they have met present requirements would present serious First Amendment petition problems, whatever other constitutional rights might

II

EXCLUSION OF CITIZENS FROM GOVERNMENT BUSINESS MEETINGS IS ORDINARILY CONSTITUTIONAL UNLESS ARBITRARY, CAPRICIOUS OR INVIDIOUS, BUT STRICT SCRUTINY, TAILORED TO THE NEEDS INHERENT IN A MEETING SITUATION, IS REQUIRED WHEN A MEETING IS EXPRESSLY DEDICATED TO THE AIRING OF THE VIEWS OF CITIZENS GENERALLY.

As we noted at the outset, the conclusion that First Amendment protections do not necessarily afford a citizen the right to address a meeting of a government body is not, of course, the end of the necessary constitutional inquiry. For, even when the First Amendment does not necessitate strict scrutiny, "[b]ecause state action exists, the policies and practices governing access * * * must not be arbitrary, capricious or invidious." (*Lehman, supra,* 418 U.S. at 303 (plurality opinion).) And, once the government *has* determined to dedicate an occasion or meeting to the expression of views by citizens generally, the First Amendment may then be implicated (*Southeastern Promotions, supra*) and necessitate that "discriminations among [speakers] be

in addition be implicated. (Cf. *NAACP* v. *Button, supra.*)

Somewhat similarly, it is far from clear that precisely the same principles govern access to individual government officials that govern access to government bodies as such. There is, to be sure, some congruence: a citizen presumably no more has a right to insist upon access to a Congressman's private office than he does to insist upon the opportunity to address the assembled House of Representatives. The question, however, whether Congress may by majority vote preclude or impede a citizen from meeting with a Congressman who is willing to—indeed, wants to—hear him out privately is quite different from the issue whether it may by majority vote exclude nonmember speakers from the floor although some Congressmen do not agree. For, if Congress cannot act as a body on the latter issue the majority would lose its protection against being compelled to be unwilling listeners.

carefully tailored to serve a substantial governmental interest" (*Mosley, supra,* 408 U.S. at 99).

A. *Government Business meetings generally, and bargaining sessions particularly*

The crux of our argument to this point is that insofar as a government body has not, either by its own decision or under statutory command, determined to open its decision-making processes or a portion thereof to public view and participation, the determination to confer with one person or group before reaching a decision but not with another implicates no protected interests and therefore must be justified only on "the relatively relaxed standard of reasonableness." (*City of Charlotte* v. *Local 660, Firefighters,* — U.S. —, 44 U.S.L. Wk. 4801, 4802.) [13]

Thus, the Wisconsin Supreme Court was quite correct in concluding that there is nothing unconstitutional about legislation commanding that in closed bargaining sessions a government body may admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees. But that Court was correct for the wrong reason. It deemed necessary an affirmative answer to the question whether the state's interest in the exclusive bargaining principle could survive the stringent test of *Dennis* v. *United States,* 341 U.S. 494. We express no view on its conclusion that this test has been

[13] Of course, this standard would not apply if the discrimination in question were subject to strict scrutiny under the equal protection clause for a reason other than any First Amendment considerations. For example, because racial classifications are necessarily suspect, a determination to permit white citizens to present their views in advance of a decision but not blacks is unlikely to pass constitutional muster.

met, other than to note that we believe the inquiry demands a more detailed analysis than that engaged in by the Wisconsin court. For, Wisconsin's policy is surely "a reasonable one with 'some basis in practical experience'." (*City of Charlotte, supra,* 44 U.S.L. Wk. at 4802.) And, that is all that is required.

As this Court has noted in cases dealing with parallel provisions of the NLRA, "orderly collective bargaining requires that the employer * * * not * * * go behind the designated representatives in order to bargain with the employees themselves * * *" (*Medo Photo Supply Corp.* v. *Labor Board,* 321 U.S. 678, 684). For, in the words of the drafters of that Act:

"The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working conditions. Since it is wellnigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. * * * [And] majority rule carries the clear implication that employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf after representatives have been picked by the majority to represent all." (S. Rep. No. 573 on S.

1958, 74th Cong., 1st Sess., (1935), at 13.) [14]

The majority rule principle also serves the interest of employers. "Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conductive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions." (*Id.*) That principle reduces internal dissension among employees which can hamper productivity and assures that the employer is not faced with conflicting demands by opposing groups of employees. (See *Emporium Capwell, supra,* 420 U.S. at 67-68). The state, whose interest in public sector collective bargaining is both as an employer and as a government interested in the welfare of all its citizens, including public employees, could reasonably determine that its need for efficient operation of government bodies was best served by following a decades-old federal policy proven effective in the private sector.

The directive that only representatives of the majority union be admitted to and heard at negotiating sessions is the necessary consequence of the determination that government bodies may bargain collectively only with the exclusive representative of employees in each unit. For, if minority groups and individuals were admitted and heard, the divisiveness sought to be avoided could reappear, and, even if the ultimate agreement could be signed with only

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[14] See also the remarks of Senator Wagner noted in *Emporium Capwell, supra,* 420 U.S. at 62, n. 13: "Without [the exclusive bargaining principle] the phrase 'collective bargaining' is devoid of meaning, and the very few unfair employers are encouraged to divide their workers against themselves." (79 Cong. Rec. 2372 (1935).)

one group, many of the advantages of the exclusive bargaining system would consequently be lost. Thus, to the extent that it required government bodies to exclude employees other than representatives of the majority from closed bargaining sessions, the state was not acting arbitrarily, capriciously or invidiously but was, instead, acting in reasonable pursuit of a set of legitimate objectives. Since, in our view, no more stringent inquiry is involved, the Wisconsin Supreme Court was correct in concluding that the exclusive bargaining system, although it involves declining in some circumstances to hear the views of interested citizens (including public employees) is perfectly constitutional.

B. *Meetings which are public forums*

Not all meetings called by government bodies can, however, fairly be characterized as business meetings of the type we have been discussing. Rather, on some occasions the government may sponsor a public meeting which is "dedicated to expressive activities" (cf. *Southeastern Promotions, supra,* 420 U.S. at 555) by citizens generally. (See n. 3 *supra.*) The paradigm of such an occasion, and of a First Amendment forum, is the town meeting.

The Court has developed the principles governing distinctions among citizens seeking to use a government-controlled location once it has been determined that, for historical or other reasons, that location serves as a forum for the expression of ideas. These principles are, first, that "[s]elective exclusions from a public forum may not be based on content alone" (*Mosley, supra,* 408 U.S. at 96), and, second, that exclusions based on criteria other than content "must be tailored to serve a substantial governmental interest" (*id.* at 99).

We believe that the same general considerations must inform the standards for excluding particular speakers from a government-sponsored occasion or meeting expressly dedicated to hearing the views of citizens generally. But some caution is required in the extrapolation of these considerations from the location context to the context of an occasion or meeting. For, "speech has always been dependent on some commitment to order and etiquette." (Kalven, *The Concept of the Public Forum,* 1965 Sup. Ct. Rev. 1, 23). And, this need for order is much more pronounced, and is likely to support a more pervasive degree of regulation, in the meeting context than in the context of a street demonstration. That is, ordinarily the government's only legitimate interest in controlling a street demonstration is to assure that the activities which otherwise occur on the street are not interrupted. The government has no affirmative obligation to assure that the message sought to be pressed is effectively communicated; that is left to the speaker. But, where the government has dedicated an occasion precisely to a discussion of views, it has an interest, and perhaps an obligation, in promoting the effectiveness of that discussion, and consequently must be able to impose rules upon the convocation. (Cf. *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 386-389.) To illustrate:

> "Listen for a moment to Alexander Meiklejohn describing a town meeting:
>
> > 'In the town meeting the people of a community assemble to discuss and to act upon matters of public interest—roads, schools, poorhouses, health, external defense, and the like. Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express

them, and to listen to the arguments of others. The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He "calls the meeting to order." And the hush which follows that call is a clear indication that restrictions upon speech have been set up. The moderator assumes, or arranges, that in the conduct of the business, certain rules of order will be observed. * * * His business on its negative side is to abridge speech. For example, it is usually agreed that no one shall speak unless "recognized by the chair." Also, debaters must confine their remarks to "the question before the house." If one man "has the floor," no one else may interrupt him except as provided by the rules. * * * If a speaker wanders from the point at issue, if he is abusive or in other ways threatens to defeat the purpose of the meeting, he may be and should be declared "out of order." He must then stop speaking, at least in that way. And if he persists in breaking the rules, he may be "denied the floor" or, in the last resort, "thrown out" of the meeting. The town meeting, as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged . . .' " (Kalven, *The Concept of the Public Forum, supra*, at 24-25, quoting A. Meiklejohn, *Political Freedom*, 24-28 (1960).)

Thus, at least the no-content-discrimination rule cannot be carried over without modification to the meeting context. It is the nature of a meeting that *some* content discrimination is necessary to the very communication sought to be promoted; at the very least, a rule of relevance to the purposes of the meeting must be enforced so that those

seeking to express their views on those purposes will have the opportunity to do so.[15] While it is premature in light of the novelty of the issue to attempt to evolve a standard in this regard, we venture that it may be possible to draw a distinction between content-related rules related to procedural needs and those which, because they focus without justification on the identity of the speaker or the viewpoint taken on a particular issue properly before the meeting, raise the censorship dangers which are anathema in the First Amendment area.[16]

We also suspect that once the need for procedural regularity is recognized as a state interest supporting substantial "abridgement" of speech at such a meeting, the degree

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[15] A similar problem was recently presented in *Toward a Gayer Bicentennial Committee* v. *Rhode Island Bicentennial Foundation*, 44 U.S.L.Wk. 2577 (D. R.I., June 6, 1976), where a government commission refused to allow an organization to use a government building dedicated to bicentennial events. Judge Pettine recognized that the commission *could* limit access to the building on a content basis—by judging whether the exhibition was consistent with the purposes of the bicentennial celebration—but held that because the building was being used as a "limited public forum," the standards used in determining access on this basis must be clear, precise and even-handed.

[16] The degree of caution necessary in this area is shown by considering that even identity or viewpoint distinctions could be shown in some circumstances to be necessary to fulfilling the purposes of a meeting. For example, a traditional New England town meeting is limited to citizens of the town; non-citizens may have an interest in the subject matter but, we expect, it would not be unconstitutional to refuse to allow them to speak. Similarly, time constraints may be such that the chairman finds it necessary to limit the number of speakers on one side of an issue to assure that those on the other side are heard; in that instance, the right to speak depends to some degree on the viewpoint taken.

to which each regulation will be scrutinized to discover whether a less inclusive regulation would serve the purpose of keeping order and fostering effective communication may differ from the scrutiny appropriate in other contexts. It is the nature of such procedural rules that they are to some degree arbitrary; in their very arbitrariness resides their ability to preserve order, for there is then no room to argue about particular instances. For example, a rule that no speaker may speak for more than five minutes might well impede an individual from communicating all he wishes to say; and it may be that on any given occasion there are not more speakers than the time available. Nonetheless, to require proof that such a rule is necessary, and that a ten-minute limit would not suffice, would be, we expect, to disregard needs inherent in the meeting situation.

III

THE ORDER APPROVED, AND THE DECLARATION THAT SIMPLY PERMITTING SPEECH AT A PUBLIC MEETING IS AN UNFAIR LABOR PRACTICE, ARE UNCONSTITUTIONAL, BUT WISCONSIN MAY BE ABLE ON THIS RECORD TO DECLARE AN UNFAIR LABOR PRACTICE WHICH WOULD SURVIVE CONSTITUTIONAL SCRUTINY.

The foregoing is not meant to suggest that this Court prescribe in this case a code of rules applicable to the various public meeting situations which may arise. To the contrary, the novelty and sensitivity of the issues necessitate, in our view, that care be taken not to prejudge questions not directly before the Court.[17] On the facts of this case,

[17] For example, the question whether a given meeting is a business meeting, or a public meeting devoted to free expression, may not always be as clear as in this case.

however, we believe the considerations discussed clearly indicate: (1) that the order issued cannot stand; (2) that the way in which the Wisconsin Supreme Court concluded that in the precise circumstances an unfair labor practice occurred was impermissible; but (3) that on the record, Wisconsin perhaps *could* without violating any constitutional rights conclude that an unfair labor practice occurred in all the circumstances. The case should therefore be remanded to give the Wisconsin courts an opportunity to review the record and interpret the applicable State statutes consistently with the First Amendment.

A. *The order*

The order issued commands that the School Board:

> "1. Shall immediately cease and desist from permitting employees, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc." (App. 187.)

Given the principles enunciated above, this order is palpably unconstitutional. It would prevent a public employee from speaking even when the issue on which he wished to speak was on the meeting agenda, so that his remarks were relevant to the public discussion; and it would prevent him from speaking on matters "subject to collective bargaining" even if an agreement had been signed and no bargaining whatever was underway. Thus, the order on its face is neither a procedural or relevance rule applicable once the floor has been opened for comments, nor is it a command limiting the matters which are to be open for public discussion by removing subjects currently being

discussed in bargaining sessions.[18] Further, because some teachers—representatives of the majority union—are to be allowed to speak on subjects on which other teachers may not be heard, and because all teachers may apparently be heard on some subjects—those not "subject to collective bargaining"—the rule is not one describing the populace to whom the forum is open. Thus, the gravamen of the order is that regardless of any other circumstances, certain individuals may not speak at a meeting dedicated to expressions of views by citizens generally on certain subjects, even though they conform with all procedural rules, even though the subject upon which they wish to speak may be addressed by other speakers, and even though they are part of the "public" to which the forum is otherwise open. We can perceive no modification of the *Mosley* principles (408 U.S. at 95) tailored to the public meeting context which would permit this identity and content distinction, and the order must therefore be vacated. (*Gooding* v. *Wilson*, 405 U.S. 518.)

B. *The unfair labor practice analysis*

The question then arises whether on the facts of this case an order could be issued without infringing First Amendment rights. If not, the judgment must be reversed; if so, it ought to be remanded for further proceedings.

Our first conclusion is that on the facts from the record actually relied on by the Wisconsin Supreme Court, no

[18] In contrast, if the order had stated that matters currently being discussed in bargaining sessions must be excluded from the agenda entirely at public comment meetings, we would expect that the order would then merely be an exercise of the state's right to dictate which subjects are to be considered at a public meeting, and for the reasons we have given would be constitutional.

unfair labor practice may be declared. That Court has held that Wisconsin law requires an "open meeting [as] the necessary and final step in the 'negotiation' process between the school board and the majority teachers' union." (*Board of Sch. Directors of Milwaukee* v. *WERC*, *supra*, 42 Wis. at 653, 168 N.W.2d at 100.) In this case it declared that because of the circumstances, the meeting, *even though* it was a regular public meeting, "certainly was part of the negotiation process" (App. 192), and that "one need only read the Holmquist statement to see that [he] was in fact negotiating * * *" (App. 193). Thus, the Wisconsin Supreme Court did not determine that the meeting in question here *was* the open meeting required by state law before a tentative contract already agreed to by the union and the Board may become final;[19] *or* that the School Board's permitting Mr. Holmquist's speech was merely *part* of a course of conduct which was in derogation of the obligation to bargain collectively. Nor did the Wisconsin Court focus on any *response* of the Board to the speech as the reason for declaring the speech illegal.[20]

[19] Indeed, it is quite clear that a tentative agreement had *not* been reached at the time.

[20] In *School Directors*, *supra*, 42 Wis.2d at 654, 168 N.W.2d at 101, the Wisconsin Supreme Court mentioned that in some instances school board members respond to questions of or positions taken by speakers at public meetings, and that if speeches by minority teachers were permitted, such discussion might occur and constitute "bargaining." The simple answer to this concern is that since, whatever First Amendment rights to speak are involved, there is certainly no right to compel a response (and see p. 4 n. 2, *supra*), that Court, if its fear is responses from a school board, could forbid such responses in proper circumstances; but to forbid the speech itself is unnecessary to pretermit the danger sought to be avoided and therefore, on the *Mosley* standard, impermissible. (See 408 U.S. at 101.)

On our analysis, it may not be declared illegal for a citizen, and therefore for a public employee, simply to speak at a public meeting on a subject properly before that meeting. Since the Wisconsin Supreme Court did not recognize this, it did not proceed to determine what course it would take if circumstances *other* than the speech were shown which supported a finding that the speech was *part* of a course of conduct which constituted an unfair labor practice as a matter of state law.[21] Nor did it proceed to determine whether the Wisconsin public employee bargaining statute could best be harmonized with the state open meeting requirement by declaring that matters in the process of being negotiated be removed from the agenda of public meetings until a tentative agreement is reached.

This case should therefore be remanded to the Wisconsin Supreme Court for an inquiry into the two latter questions on the basis of state law. Surely no constitutional question would be raised by a finding that the Board had committed a state unfair labor practice by aiding and abetting Mr. Holmquist in his activities and thereby undermining the status of the exclusive bargaining representative.[22] The fact that these activities culminated in a speech would not deprive Wisconsin of the ability to declare the

[21] The trial court did go beyond the speech itself, and concluded that: "Thus, the board's conduct involved more than its permitting Holmquist to speak to it on fair-share. It involved conduct which could only have for its purpose the frustration of the rights of the majority." (App. 177.) However, the WERC seems to have focused on the speech alone (App. 133), and the Supreme Court, while quoting other portions of the trial court opinion, did not cite or approve its findings on other aspects of the situation, and expressly relied on the speech alone.

[22] We express no view on the question whether the record would support such a holding.

reception of the speech *part* of the illegal course of conduct. (*NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620.) If such a violation were found, an order could be entered proscribing future similar conduct by the School Board, as long as that order did not command that public employees not be allowed to speak at general public meetings even if the School Board were not implicated in any way in the circumstances leading to the speech.

Similarly, as noted, *supra*, n. 18, we think it is constitutionally open to Wisconsin to interpret its public employee collective bargaining statute to preclude government bodies from placing matters under negotiation on the agenda of public comment sessions prior to reaching tentative agreement. The Wisconsin courts should be given the opportunity to consider whether, in light of the constitutional invalidity of the balance it has heretofore struck, it wishes to reinterpret state law in this manner.

CONCLUSION

For the reason stated above, the cases should be remanded to the Wisconsin Supreme Court for consideration whether in light of the constitutional constraints in this area a state unfair labor practice has occurred and, if so, to enter an appropriate, limited order.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, *et al.*,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF PUBLIC SERVICE RESEARCH COUNCIL, URGING REVERSAL

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF PUBLIC SERVICE RESEARCH COUNCIL, URGING REVERSAL

Pursuant to Rule 42 of the Rules of this Court, the Public Service Research Council hereby moves for leave to file the annexed brief *amicus curiae*, urging that the decision of the Supreme Court of Wisconsin be reversed. Appellee Madison Teachers, Inc. has withheld its consent to the filing of this brief.

INTEREST OF THE PUBLIC SERVICE RESEARCH COUNCIL

The Public Service Research Council is a voluntary association of private citizens, legislators, scholars, and commentators united by a common concern with the maintenance of limited, constitutional government and the tradition of federalism. The Council views the decision of the Wisconsin Supreme Court here for review as posing a serious threat, not only to the individual liberties of countless public employees, but also to the very system of representative, republican government presupposed and protected by our Constitution. While believing that the Appellants herein are seriously and skillfully defending their interests, the Council is none the less concerned that their natural preoccupation with the issues of most immediate relevance to them may so narrow the focus of their attention as to cause them to overlook or not sufficiently to emphasize to this Court the deeper, broader, and more ominous problems raised by this case.

The Wisconsin Supreme Court based its decision on the premiss that free speech and free petition for public employees may be subordinated to, and in certain instances totally engulfed and preëmpted by, the "exclusive-representation" device recently imported into public-sector labor relations from the private sector. If this Court should sustain that premiss, the Council believes and fears, it will inadvertently have created a precedent inconsistent and incompatible, not only with all principles of First and Fourteenth Amendment adjudication heretofore recognized, but also with the

continued existence of those conditions of freedom without which our republican institutions cannot survive. Therefore, the Council hopes and intends in its annexed brief *amicus curiae* to present to this Court the fundamental issues of free speech and free petition involved in this case from the enhanced perspective of observers who, unlike the parties, can fully concern themselves with and have given much consideration to the long-term implications of the issue raised here. The Council feels and submits that its contribution will materially assist this Court in properly establishing the broad context necessary for resolution of the issue, and in identifying and understanding the grave implications which its decision may have for public employees and the process of representative government in the United States.

Respectfully submitted,

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BRIEF AMICUS CURIAE ON BEHALF OF PUBLIC SERVICE RESEARCH COUNCIL, URGING REVERSAL

The Public Service Research Council files this brief *amicus curiae* in support of Appellant Board of Education, City of Madison, Joint School District No. 8, urging this Court to reverse the decision of the Wisconsin Supreme Court.

INTEREST OF THE PUBLIC SERVICE RESEARCH COUNCIL

The interest of the Public Service Research Council in participating as *amicus curiae* in this case is set forth in the Motion for Leave to File Brief Amicus Curiae submitted herewith.

SUMMARY OF THE ARGUMENT

The fundamental issue in this case is whether certain Wisconsin statutory provisions violate the First and Fourteenth Amendments to the United States Constitution because, as construed and applied by the Wisconsin Supreme Court, they deny nonunion public-school teachers the freedom to petition their employer with respect to matters of public concern. That issue is here for decision under whatever interpretation this Court gives to the Wisconsin Supreme Court's opinion.

The Appellant Board of Education has "standing" to litigate the freedom-of-petition issue, both in its own right and as a spokesman for nonunion public-school teachers not now before the Court.

This Court has a right and duty to determine for itself whether the challenged statutory provisions abridge freedom of petition, or merely define the privilege of "negotiation" granted by state law. In so doing, it cannot be bound by the purported distinction between petition and "negotiation" advanced by the Wisconsin Supreme Court. Neither can it assume, as did that Court, that the "exclusive-representation" device has been held to and may constitutionally nullify

freedoms otherwise guaranteed to all public employees by the First and Fourteenth Amendments. And it should not permit such a result in this case.

The record discloses that the acts against which the Wisconsin Supreme Court applied the challenged statutory provisions were not acts of "negotiation", but rather were pure speech and petition concerning public matters properly before a public meeting of a governmental agency. The contrary finding by the Wisconsin Supreme Court is nonrational.

Because speech and petition are involved here, the Appellees have the burden of proving that special circumstances exist to justify regulation or incidental limitation of these freedoms. Such a showing has not been and cannot be made. The limitation of First Amendment freedom countenanced by the Wisconsin Supreme Court cannot be rationalized under any principle of constitutional adjudication heretofore recognized by this Court. It is therefore repugnant *per se* to the First and Fourteenth Amendments.

The decision of the Wisconsin Supreme Court strikes directly at the freedom of political participation, upon which the legitimacy of representative government rests. If this Court permits the "exclusive-representation" device to extend as far as the Wisconsin Supreme Court would allow, it will irretrievably undermine the very foundations of our governmental system.

For these reasons, the decision below should be reversed.

ARGUMENT

I.

THIS CASE SQUARELY PRESENTS THE QUESTION OF WHETHER CERTAIN WISCONSIN STATUTORY PROVISIONS, AS CONSTRUED AND APPLIED BY THE WISCONSIN SUPREME COURT, VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The basic issue in this case is whether Wisconsin Statutes §§ 111.70(1)(d), 111.70(2), 111.70(3)(a)(1, 4) are repugnant to the First and Fourteenth Amendments to the United States Constitution because, as construed and applied by the Wisconsin Supreme Court in the decision below, *City of Madison, Joint School Dist. No. 8* v. *Wisconsin Employment Relations Comm'n*, 69 Wis. 2d 200, 231 N.W.2d 206 (1975), they deny to nonunion public-school teachers the freedom to petition their employer, an agency of their state government, with respect to matters of public concern related to the terms and conditions of their employment.

A. The Wisconsin Supreme Court's Treatment of the Federal Constitutional Issue Raised in This Case is Ambiguous.

While the opinion of the Wisconsin Supreme Court is unequivocal on the central issue of state law involved here, its treatment of the crucial federal issue is

ambiguous. As a matter of state law, the Court held that the mere reading to the Board of Education by a nonunion teacher of a statement concerning matters then the subject of negotiations between the Board and the teacher's "exclusive representative" constitutes "negotiation" or "bargaining". 69 Wis. 2d at 208-15, 231 N.W.2d at 211-14.

As a matter of federal law, however, two interpretations of the Wisconsin Court's opinion are possible. At one point, the Court acknowledged that its affirmance of the decision of the Wisconsin Employment Relations Commission might "infringe upon the freedom to speak and to petition the federal and state governments". But it went on to state that such an infringement, if found, would be "within the limits imposed on the restriction of those rights by United States Supreme Court decisions and the decisions of [the Wisconsin] court." *Id.* at 211, 231 N.W.2d at 212. This language strongly indicates that the Court independently judged its own construction and application of state law against federal constitutional standards. At another point, none the less, it described

> [t]he question of whether speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to representatives of the majority bargaining unit [as having] been answered in the affirmative. None of the parties to this action disputes that. *Now the question is whether the activity herein complained of by [the Union] * * * qualifies as bargaining and can, therefore, be restricted under [Wisconsin law].*

Id. at 212, 231 N.W.2d at 213 (emphasis supplied). This language, and especially the conclusory "therefore" clause, suggests that the Wisconsin Court assumed that

this Court had heretofore settled all relevant questions of federal constitutional law, and that it might therefore limit its own role to one of interpreting state law.

Thus, an ambiguity exists with respect to the apparent basis of the decision below in state or federal law. This Court need not resolve that ambiguity, however, to reach and decide the federal constitutional issue.

B. The Federal Constitutional Issue Is Here for Decision Under Whichever Interpretation This Court Gives to the Wisconsin Supreme Court's Opinion.

Under either possible interpretation of the Wisconsin Court's decision, the federal constitutional issue is squarely presented in this appeal. If this Court adopts the first reading of the opinon below, it "must * * * accept the construction that the Supreme Court of Wisconsin has put upon the * * * statute" and address the question of "the constitutionality of a state law that categoricaliy prevents a" nonunion public employee from petitioning his employer at a public meeting with regard to matters related to the terms and conditions of his employment. *Groppi* v. *Wisconsin*, 400 U.S. 505, 507-08 (1971); *accord, Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 61 n.3 (1963).

If this Court adopts the alternative reading of the Wisconsin Court's decision, the same result obtains. The assumption – or even the assertion – by a state court that its opinion rests exclusively on state law cannot

foreclose further review. "This [C]ourt must determine for itself whether the suit really involves any Federal question * * *." *Newport Light Co.* v. *City of Newport*, 151 U.S. 527, 536-37 (1894) (and cases there cited). Here, any argument that the Wisconsin Court's decision rests upon a state-law ground adequate to preclude federal review and reversal fails, for three reasons.

First, "the duty rests on this Court to decide for itself facts *or constructions* upon which federal constitutional issues rest." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121 (1954) (footnote omitted; emphasis supplied). The rule of deference to "the construction of a local statute approved by the state court of last resort * * * does not apply where this [construction] is fanciful and amounts to a mere subterfuge." *Supreme Lodge, K.P.* v. *Meyer*, 265 U.S. 30, 38 (1924) (opinion of McReynolds, J.) (and cases there cited). Neither is it applicable "where the non-Federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question." *Enterprise Irrig. Dist.* v. *Farmers' Mutual Canal Co.*, 243 U.S. 157, 164 (1917). As shown in Part IV(C) *infra*, the "finding" of the Wisconsin Supreme Court that a petition to an agency of state government by a public employee at a public meeting constitutes "negotiation" or "bargaining" is so lacking in rationality as to be "fanciful" or "essentially arbitrary" – making it at least appropriate, if not necessary, for this Court "to inquire whether [the Wisconsin statute] is fairly susceptible of the construction adopted by the state court." *Meyer*, 265 U.S. at 38.

Secondly, if the Wisconsin Supreme Court limited its decision to a construction of state law *on the erroneous assumption that certain prior decisions of this Court had already foreclosed the federal constitutional issue in this case,* its conclusion depended upon *its own* faulty construction and application of decisions of this Court. And that construction is not binding here. *Morehead* v. *New York* ex rel. *Tipaldo,* 298 U.S. 587, 621 (1936) (Hughes, C.J., dissenting). Therefore it remains the province of this Court to decide the underlying federal question upon which depends the adequacy of the state-law ground advanced by the Wisconsin Supreme Court.

Finally, this Court should reject any contention that the Board has somehow "waived" its right to contest whether the Wisconsin statutory provisions in issue here are repugnant to the United States Constitution as applied. For neither the propriety nor the existence in fact of any "waiver" can be established under the circumstances of this case. State officials, to be sure, may properly concede litigable issues related to their exercise of a right, power, privilege, or immunity peculiar to them under state law; *but they cannot constitutionally proffer a binding consession which extinguishes any disability, duty, or liability imposed in the interest of others by the United States Constitution. See* U.S. Const. art. VI, cl. 3. Moreover, what the Board has, in logic, not sought to dispute throughout this litigation is merely that: *if* the actions of the nonunion teacher Holmquist could rationally be categorized as "negotiation" or "bargaining" under Wisconsin law; and *if* that categorization as a matter of state law brought

those actions within a further category of "negotiation" or "bargaining" which, as a matter of applicable federal precedents, could be limited through the "exclusive-representation" device without affront to the First and Fourteenth Amendments; *then and only then* would the latter precedents obviate further debate on the federal question, *by hypothesis.* But these preconditions to "waiver" have not been satisfied in this case – because, as shown in Part IV(C) *infra,* the Wisconsin Court's "finding" that Holmquist's actions constituted "negotiation" or "bargaining" under state law is nonrational; and because, as shown in Part III(B)(2) *infra,* this Court has never held and should not now hold that the "exclusive-representation" device may constitutionally be employed to stifle the exercise of freedom of petition by public employees, in any context or for any reason.

Therefore, the federal constitutional issue is squarely presented no matter how this Court chooses to read the decision of the Wisconsin Supreme Court.

II.

THE BOARD HAS "STANDING" TO LITIGATE THE CONSTITUTIONALITY OF INFRINGEMENTS UPON ITS OWN DUTIES, RIGHTS, AND IMMUNITIES UNDER FEDERAL LAW, AND UPON THE CORRESPONDING LEGAL RELATIONS OF NONUNION TEACHERS, ARISING OUT OF THE CONSTRUCTION AND APPLICATION AS AGAINST IT OF THE CHALLENGED WISCONSIN STATUTORY PROVISIONS.

Although the fundamental issue in this case is the extent to which Wisconsin may employ the "exclusive-representation" device to deny *to nonunion public employees* the freedom to petition their employer with respect to matters of public concern related to the terms and conditions of their employment, the Board has "standing" to litigate the question both because the United States Constitution imposes upon it a duty measured by its employees' right to petition, and because those employees affected by the decision below must rely upon it to vindicate their interests in this action.

A. The Board has a Duty Under Article VI of and Under the First and Fourteenth Amendments to the United States Constitution to Hear and Accept Petitions From Its Nonunion Teacher-Employees, and an Implied Right and Immunity Under Those Provisions Against Interference With the Fulfillment of That Duty.

The First Amendment, through the Due Process Clause of the Fourteenth, enjoins the States to "make

no law * * * abridging * * * the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *DeJonge* v. *Oregon*, 299 U.S. 353, 364-65 (1937); *Hague* v. *CIO*, 307 U.S. 496, 519 (1939) (opinion of Stone, J.); *Bridges* v. *California*, 314 U.S. 252, 277 (1941). This injunction applies against the States the same strict standard which restrains the federal government. *See Williams* v. *Florida*, 399 U.S. 78, 106-07 (1970) (Black, J., concurring in part and dissenting in part), *quoting Malloy* v. *Hogan*, 378 U.S. 1, 10-11 (1964). Under that standard, freedom of petition comprehends any demand for an exercise of governmental authority in furtherance of the interests and prosperity of the petitioners. *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-40 (1961). It extends to "every person or group engaged * * * in trying to persuade [legislative] action". *Liberty Lobby, Inc.* v. *Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1968) (Burger, J.). And it protects the "approach of citizens or groups of them to administrative agencies". *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972). Indeed, the Amendments reach even an individual public employee's approach to his employer on "matters of a local nature". *Jannetta* v. *Cole*, 493 F.2d 1334, 1337 n.5 (4th Cir. 1974).

Pursuant to Article VI, cl. 3, the members of the Board have taken oaths to support the United States Constitution, including the First and Fourteenth Amendments. As against the Board's own teacher-employees – and irrespective of the membership or nonmembership of those teachers in any labor union – the members of the Board have a constitutional duty

coextensive in substance with the teachers' constitutional right to present demands for an exercise of governmental authority in furtherance of the teachers' interests and prosperity. Furthermore, a necessary concomitant of this constitutional duty is a constitutional "right to be free from direct and deliberate interference with the performance of the * * * duty". *Brewer* v. *Hoxie School Dist.*, 238 F.2d 91, 99 (8th Cir. 1956). And the existence of the latter right implies a concomitant constitutional immunity from any legislative, executive, administrative, or judicial command of state government purporting to interfere with, control, or prevent the fulfillment of that duty or the exercise of that right.

The existence of this duty, and of its concomitant right and immunity, is sufficient to confer "standing" on the Board to litigate the issue of its nonunion teacher-employees' freedom of petition, which measures the extent of that duty, right, and immunity. Believing that the challenged provisions of Wisconsin law are unconstitutional, the members of the Board "are in the position of having to choose between violating their oath and taking a step – refusal to comply with [the decision of the Court below] – that would be likely to bring their expulsion from office * * *. There can be no doubt that [they] thus have a 'personal stake in the outcome' of this litigation." *Board of Educ.* v. *Allen*, 392 U.S. 236, 241 n.5 (1968), *citing Baker* v. *Carr*, 369 U.S. 186, 204 (1962). *See also Wood* v. *Strickland*, 420 U.S. 308, 322 (1975) ("school board member is not immune from liability for damages under [42 U.S.C.]

§ 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [a] student").

B. Under the Circumstances of This Case, Its Nonunion Teacher-Employees Must Rely on the Board Both to Exercise and to Vindicate Their Constitutionally Guaranteed Liberty.

The Board has "standing" to litigate the issue of its nonunion teacher-employees' freedom of petition not only because the decision of the Wisconsin Court impinges upon its own constitutional duty, right, and immunity, but also because of its special relationship to those employees as their employer and as the immediate recipient of their petitions.

This Court has repeatedly granted litigants "standing" to assert constitutional *jus tertii* in order to avoid "dilution" of the legal relations of third parties not before the bar. *E.g.*, *NAACP* v. *Alabama* ex rel. *Patterson*, 357 U.S. 449, 466 (1958) (organization granted standing to raise constitutional liberties of its members where individuals' freedom of association would otherwise have been infringed). A number of opinions have considered "the impact of the litigation on the third-party interests" in terms of whether the asserted freedoms of the third parties "are likely to be * * * adversely affected unless those rights are considered in a suit involving" parties before the Court who have a special relationship to the third parties.

Eisenstadt v. *Baird*, 405 U.S. 438, 445-46 (1972), *citing Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965). From these opinions, the commentators have concluded that, where such a relationship exists, a litigant "should always be granted standing to claim that the imposition of a duty on him affects his behavior in such a way that the constitutional rights of third parties are impaired." Comment, "Standing to Assert Constitutional *Jus Tertii*", 88 *Harv. L. Rev.* 423, 432 (1974) (footnotes omitted).

Such a special relationship exists here, for two reasons. First, this Court has already recognized the employer-employee nexus as a basis for "standing" to assert constitutional *jus tertii*. *Truax* v. *Raich*, 239 U.S. 33, 38-39 (1915). More fundamental is the petitioner-recipient connexion unique to this case because of its public-employment context. The Board is not merely an advocate of the rights of its nonunion teacher-employees to petition. *See Eisenstadt*, 405 U.S. at 445. Rather, it is the necessary agency to which those teachers must look and upon which they must rely in exercising their First and Fourteenth Amendment freedoms. This renders its claim to "standing" especially compelling. Comment, 88 *Harv. L. Rev.* at 441. In addition, the nonunion teachers "are not themselves subject to prosecution [under the challenged Wisconsin statutory provisions] and, to that extent, are denied a forum in which to assert their own rights". *Eisenstadt*, 405 U.S. at 446, *citing NAACP* v. *Alabama*, 357 U.S. at 459. That being so, the Board is the logical – and, at this juncture, the only – party available to vindicate their constitutional interests in a single, expeditious proceeding.

For these reasons, the Board has "standing" to litigate *all* aspects of the freedom-of-petition issue arising out of the decision of the Wisconsin Supreme Court.

III.

THIS COURT MUST DETERMINE FOR ITSELF WHETHER THE CONSTRUCTION AND APPLICATION OF THE CHALLENGED WISCONSIN STATUTORY PROVISIONS BY THE WISCONSIN SUPREME COURT ABRIDGE THE FREEDOM OF PETITION GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS, OR MERELY DEFINE THE PRIVILEGE OF "NEGOTIATION" UNDER WISCONSIN LAW.

As Mr. Justice Jackson astutely noted, "[i]t is not often in this country that we now meet with direct and candid efforts to stop speaking * * * as such. *Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control.*" *Thomas* v. *Collins*, 323 U.S. 516, 547, *rehearing denied*, 323 U.S. 819 (1945) (concurring opinion; emphasis supplied). Such is the situation here.

A. The Wisconsin Supreme Court Based Its Decision on a Purported Distinction Between Constitutionally Protected Petition and Unprotected "Negotiation".

In its opinion, the Wisconsin Supreme Court explicitly assumed the existence of a category of action denominated "negotiation" or "bargaining" which, although admittedly an aspect of constitutionally protected petition and speech, can purportedly be subjected to the "exclusive-representation" device in order to achieve "stability" in public-sector labor relations.

> The principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts; *the First Amendment rights of those persons are, to that extent, thereby infringed.* But the gravity of that evil was considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations.
>
> * * *
>
> The question of whether speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to representatives of the majority bargaining unit has been answered in the affirmative.

69 Wis. 2d at 211-12, 231 N.W.2d at 212-13 (emphasis supplied).

The Wisconsin Court then assumed that, if action by a public employee can somehow be characterized as "negotiation" or "bargaining" under state law, then that characterization alone settles all questions of freedom of petition.

> [T]he question is whether the activity herein complained of * * * qualifies as bargaining *and can, therefore, be restricted under* [*Wisconsin law*].

Id. at 212, 231 N.W.2d at 213 (emphasis supplied).

This Court, however, cannot give any credence whatsoever either to these assumptions or to the flimsy card-house of equally erroneous suppositions upon which they stand.

B. The Assertion by the Wisconsin Supreme Court of a Purported Distinction Between Constitutionally Protected Petition and Unprotected "Negotiation" Neither Binds This Court nor Relieves It of Its Duty To Determine the Constitutional Facts in This Case.

This Court is at liberty to conclude that the meaning of the challenged Wisconsin statutory provisions is fixed by the decision of the Wisconsin Supreme Court "as if th[at] meaning had been specifically expressed in the enactment". *Morehead* v. *New York* ex rel. *Tipaldo*, 298 U.S. 587, 609 (1936). Such a conclusion is *not* required here. *See* Part I(B) *supra.* But even if this Court chooses to follow that course, it should not accord the decision below any binding effect on the issue of federal constitutional law raised in this appeal.

1. Even if the Wisconsin Supreme Court Validly Distinguished Petition from "Negotiation" as a Matter of State Law, This Court Must Decide Whether That Distinction, as Applied, is Repugnant to the First and Fourteenth Amendments.

The basic syllogism in the Wisconsin Court's opinion is a glaring non sequitur. It certainly is true that, under Wisconsin law, there is some category of action which may be denominated "negotiation" or "bargaining". And it may be true that, under federal law, there is some form of "negotiation" or "bargaining" which lies outside the protection of the First and Fourteenth Amendments, in that a State may constitutionally require its employees, as a condition of their employment, to participate in such "negotiation" or "bargaining" through the "exclusive-representation" device. But it does not follow that what is, in fact, "negotiation" or bargaining" under state law is *therefore* that unique "negotiation" or "bargaining" arguably unprotected under federal law. The two questions are logically and legally distinct. Moreover, they are separate questions the ultimate resolution of which the Constitution consigns to different tribunals: The one it leaves to the Wisconsin Court, if the latter's construction of state law is not "palpably unfounded". *Leathe* v. *Thomas*, 207 U.S. 93, 99 (1907). The other it entrusts to this Court, under all circumstances.

The Wisconsin Court, by the use of mere verbiage, cannot reduce these two independent questions to a single issue subject to its exclusive jurisdiction. The "proposition [cannot] be maintained that the Constitution meant to prohibit names and not things", or that state action "which is expressly forbidden by words

most appropriate for its description, may be performed by the substitution of a name". *Craig* v. *Missouri*, 29 U.S. (4 Pet.) 410, 433 (1830). "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP* v. *Button*, 371 U.S. 415, 429 (1963). For that reason, this Court is "compelled by neither precedent nor policy to give any more weight to the epithet[s]" "negotiation" and "bargaining" than it has accorded to "the various other formulae for the repression of expression that have been challenged" here on other occasions. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964). Neither "negotiation" nor "bargaining" "can claim [any] talismanic immunity from constitutional limitations." Rather, they each "must be measured by standards that satisfy the First Amendment." *Id.*

Therefore, although this Court may adopt as binding the construction which the Wisconsin Supreme Court has put upon the challenged provisions of state law, it "is not bound by the characterization of [those provisions], so far as that characterization may bear upon the question of [their] constitutional effect." *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U.S. 346, 348 (1922). Instead, this Court retains the right and duty to consider the "nature and effect" of these provisions unfettered by the State's use of labels. *Macallen Co.* v. *Massachusetts*, 279 U.S. 620, 625-26 (1929). But to do so, it must "regard the substance, rather than the form," and employ "the controlling test * * * found in the operation and effect of the law as applied and enforced by the state." *St. Louis S.W.R.R.* v. *Arkansas* ex rel. *Norwood*, 235 U.S. 350,

362 (1914) (and cases there cited). For "the Constitution is concerned with the practical consequences, not the formal categorizations, of state law." *North Carolina* v. *Alford*, 400 U.S. 25, 37 (1970).

"Practical consequences", of course, are matters of fact; but, in this case, whether Holmquist's actions constituted protected petition or unprotected "negotiation" or "bargaining" is a question of *constitutional* fact under the First and Fourteenth Amendments with respect to which this Court should make an independent judgment. *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 53-54 (1971) (opinion of Brennan, J.), *citing Jacobellis* v. *Ohio*, 378 U.S. 184, 190 (1964); *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963); *and Blackburn* v. *Alabama*, 361 U.S. 199, 205 n.5 (1960). This is so not merely because the Wisconsin Court's "conclusion of law as to a Federal right and [its] finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts". *Fiske* v. *Kansas*, 274 U.S. 380, 385-86 (1927); *accord*, *Norris* v. *Alabama*, 294 U.S. 587, 589-90 (1935); *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 659 (1945) (and cases there cited). It is also and more fundamentally important here because of this Court's "solemn responsibility for maintaining the Constitution inviolate". *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959). Under the peculiar circumstances of this case, that responsibility compels this Court "to examine 'the evidence [adduced in the state court] to see whether it furnishes a rational basis for the characterization put on it' * * * by the

enunciation of a constitutionally acceptable standard in describing the effect of the conduct." *Wood* v. *Georgia*, 370 U.S. 375, 386 (1962), *quoting* In re *Sawyer*, 360 U.S. 622, 628 (1959). *Indeed, nothing is more important for the disposition not only of this case but also of others that must follow it than for this Court unequivocally and definitively to distinguish protected petition from unprotected "negotiation" or "bargaining", by establishing "standards and criteria, measured against the requirements drawn from [the First and Fourteenth Amendments], and their proper applications". Watts* v. *Indiana*, 338 U.S. 49, 51 (1949) (emphasis supplied).

2. Whatever Its Constitutional Status May Be in Other Contexts, Under the Facts of This Case and in Light of the Peculiarly Critical State of Constitutional Issues in Public-Sector Employment, the "Exclusive-Representation" Device Cannot Be Assumed or Permitted Wholly to Nullify the Freedoms Guaranteed to All Public Employees by the First and Fourteenth Amendments.

"Standards and criteria" are critically necessary here because "[t]he question of whether speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to representatives of the majority bargaining unit has" *not* "been answered" – "in the affirmative", or in the negative; in public-, or in private-sector employment; and irrespective of the contrary opinion of the Wisconsin Supreme Court. 69 Wis. 2d at 212, 231 N.W.2d at 213.

No decision of this Court has ever addressed any aspect of the problem of "exclusive representation" for dissenting public-sector employees, and certainly not the clash between the "exclusive-representation" device and the explicit guarantee of the First and Fourteenth Amendments that *all* citizens – whether or not public employees and whether or not union members – shall exercise and enjoy an *equal* freedom to petition their government. Indeed, even in the private sector judicial review has never reached the many serious constitutional infirmities of "exclusive representation". When the constitutionality of the National Labor Relations Act was first in issue, the Labor Board selected its test cases so as "intentionally [to] avoi[d] presenting th[is] Court with the 'touchy' and more doubtful questio[n] of * * * ['exclusive representation']." 1 J.A. Gross, *The Making of the National Labor Relations Board* 187 (1974). Thus, when in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), an employer challenged that Act on various constitutional theories,* this Court *avoided* the issue of "exclusive representation" on the ground that the "bargaining" scheme of § 9(a) of the Act did *not* provide for complete exclusivity:

> We said [in another case] that * * * the injunction against the [employer's] entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was "designed only to prevent collective bargaining with anyone purporting to represent employees" other than the representative they had selected. It was taken "to prohibit the negotiation of labor

> contracts generally applicable to employees" in the described unit with any other representative than the one so chosen, *"but not as precluding such individual contracts" as the [employer] might "elect to make directly with individual employees." We think this construction also applies to §9(a) of the National Labor Relations Act.*
>
> *The Act * * * does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine."*

301 U.S. at 44-45 (footnote omitted; emphasis supplied). Similarly, in a contemporaneous employer challenge to the Railway Labor Act, this Court held that the "bargaining" scheme of that Act did *not* provide for absolute "exclusive representation". *Virginian Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 548-49 (1937).

Seven years later, *in cases raising only issues of statutory construction*, this Court re-interpreted the "bargaining" scheme of the Railway Labor and National Labor Relations Acts so as to preclude individual contracts (and, therefore, individual negotiations) between a private-sector employer and his employees. *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 346-47 (1944); *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 334-39 (1944). Neither of these decisions, however, reconsidered the issue of constitutionality raised in *Jones & Laughlin* and *Virginian Ry.*, although the statutory constructions adopted in the latter cases formed the necessary

predicate for their constitutional holdings. *E.g.*, Comment, "The Mechanics of Collective Bargaining", 53 *Harv. L. Rev.* 754, 789-91 (1940). The contemporaneous decision in *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192 (1944), also failed to reach the unconstitutionality of "exclusive representation"; for there, this Court created the "duty of fair representation" in order to *avoid* deciding serious constitutional questions of due process and equal protection. *Id.* at 198.

This history makes clear that the Wisconsin Court's reliance on such decisions as *Vaca* v. *Sipes*, 386 U.S. 171 (1967), and *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944), is misplaced. *See* 69 Wis. 2d at 212, 231 N.W.2d at 213. For neither these decisions themselves, nor the precedents upon which they were based, dealt with any constitutional issue at all. And no other decision of this Court has ever held that the free speech of an employee in the private sector may *constitutionally* be limited by the "exclusive-representation" device.

The unresolved constitutional problem is exacerbated in public-sector employment. It is, of course, clear that *private* employers, absent statutory restriction, may condition employment on severe limitations of their employees' speech and association. *E.g.*, *Holodnak* v. *Avco Corp.*, 514 F.2d 285, 292 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975). But it is equally clear that "the state * * * governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer". *Cafeteria & Restaurant Workers, Local 473* v. *McElroy*, 367 U.S. 886, 897-98 (1961); *cf. Evans* v. *Newton*, 382 U.S. 296, 298-300 (1966). *Public*

employers may *not* condition employment on their employees' surrender of freedoms secured by the First and Fourteenth Amendments. *E.g.*, *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-06 (1967); *Baggett* v. *Bullitt*, 377 U.S. 360, 379-80 (1964); *Cramp* v. *Board of Pub. Instr.*, 368 U.S. 278, 288 (1961); *Shelton* v. *Tucker*, 364 U.S. 479, 485-86 (1960). The lower federal courts have uniformly interpreted and applied decisions such as *Pickering* to preclude state and local governments from penalizing public employees because of labor-union membership. *E.g.*, *American Fed'n of State, County, and Municipal Employees* v. *Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Atkins* v. *City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969) (three-judge court). If these lower-court decisions are correct, they logically compel the further conclusion that a public employer cannot limit its employees' freedom to petition for a redress of grievances, through the "exclusive-representation" device or otherwise, on the basis of their mere nonmembership in a labor union.

Given the meagre factual record in the instant case, however, this Court should not address the underlying and complex issue of "exclusive representation" which the Wisconsin Supreme Court erroneously assumed to be already decided. *E.g.*, *Askew* v. *Hargrave*, 401 U.S. 476, 478-79 (1971); *Borden's Farm Products Co., Inc.* v. *Baldwin*, 293 U.S. 194, 210-13 (1934); *Wilshire Oil Co., Inc.* v. *United States*, 295 U.S. 100, 102-03 (1935). Certainly it need not do so. But the record is

sufficient for, *and logically compels*, this Court to hold: (i) that a significant, *unanswered* constitutional question exists as to whether the "exclusive-representation" device abridges the freedom of petition of nonunion public employees in *any* application; and (ii) that, *as applied here*, the device is repugnant *per se* to the First and Fourteenth Amendments. For any other disposition of this case – and especially an uncritical acceptance (in any degree) of the Wisconsin Court's gratuitous and erroneous assumption that the First and Fourteenth Amendment issues surrounding "exclusive representation" are somehow settled – will effectively nullify the guarantee of the latter Amendments for all nonunion public employees in those States where the "exclusive-representation" device has been imposed on public-sector labor relations. Moreover, any such disposition of this case will inadvertently anticipate constitutional questions of the utmost public concern and gravity which this Court should avoid unless their decision is absolutely necessary. *E.g., Liverpool, N.Y. & P.S.S. Co.* v. *Comm'rs of Emig.*, 113 U.S. 33, 39 (1885); *Burton* v. *United States*, 196 U.S. 283, 295 (1905); *United States* v. *CIO*, 335 U.S. 106, 124-125 (1948) (Frankfurter, J., concurring).

IV.

AS A MATTER OF LAW AND FACT, HOLMQUIST'S ACTS CONSTITUTED AN EXERCISE OF THE FREEDOM OF PETITION, AND NOT OF ANY SPECIES OF "NEGOTIATION" CONSTITUTIONALLY DISTINCT FROM PETITION.

The basic question of constitutional fact in this case is whether Holmquist's acts fall within the category of petition protected by the First and Fourteenth Amendments, or can constitutionally be denominated a species of "negotiation" or "bargaining" distinct from petition. The record can support only one finding: namely, that those acts constituted an exercise of the freedom of petition.

A. The Meeting of the Board Was a Public Meeting, Within the Ambit of the First and Fourteenth Amendments.

The Wisconsin Supreme Court acknowledged that the Board meeting in issue was a *public* meeting, at least in part, and not a special collective-bargaining session. As the Court stated, "[a]t the * * * meeting, *a portion of time was devoted to public appearances.*" 69 Wis. 2d at 205, 231 N.W.2d at 209 (emphasis supplied). And it emphasized the *public* nature of this part of the meeting by noting that "[s]everal individuals spoke during this time", including the union president. *Id.* at 206, 231 N.W.2d at 210. Moreover, the Wisconsin Court distinguished the *public* portion of the meeting

from a later *non*-public portion during which "the board went into *executive* session and considered the unresolved collective bargaining issues * * *." *Id.* at 207, 231 N.W.2d at 210 (emphasis supplied).

The order of the Wisconsin Employment Relations Commission affirmed by the Wisconsin Supreme Court also implicitly recognized that meetings of the Board are devoted, at least in part, to appearances by the general public. That order (to the extent pertinent here) requires that the Board:

> Shall immediately cease and desist from permitting employes, other than representatives of Madison Teachers, Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers, Inc.

69 Wis. 2d at 209, 231 N.W.2d at 211. Revealingly, the order does not compel the Board indiscriminately to suppress appearances by *any* citizen on *any* subject, or even appearances by *any* citizen on matters *"subject to collective bargaining"* – which might be appropriate were Board meetings strictly "negotiating" or "bargaining" sessions. Rather, it requires the Board to suppress appearances *only* by *nonunion teachers* who seek to read or present petitions on matters *"subject to collective bargaining"*. Such specificity would clearly be unnecessary were meetings of the Board not conducted as a public forum.

Therefore, whether or not matters "subject to collective bargaining" were raised at the meeting in issue, or are raised as a matter of course at all Board

meetings, this Court should hold that that meeting and all such meetings are *public* for First and Fourteenth Amendment purposes.

B. The Issues Raised at the Meeting of the Board Were Timely Public Issues Within the Protection of the First and Fourteenth Amendments.

The public nature of the Board meeting is highlighted by the public nature of the matters raised at that meeting. As a generality, terms and conditions of public employment are matters of public concern, by hypothesis. Nothing government officials do in the exercise of their authority should be – and, this Amicus submits, constitutionally can be – removed from public concern and scrutiny. For government officials are the agents of society; and their principal has an inalienable right to full knowledge of and to influence the manner in and the means by which they claim to serve the public interest. Furthermore, little pertains more directly to the conduct of government and to the performance of its functions than the terms and conditions of public employment and the process by which they are established. For this process, and its results, in large measure determine what government shall accomplish for its citizens, and what cost it shall exact from them. Therefore, few matters could be of greater public interest than labor relations in the public sector. This is especially true where compulsory-unionism arrangements such as "fair share" are in issue. The contemporary debate over compulsory public-sector

unionism in all its aspects is intense; the issues raised are profoundly difficult; and all segments of society, from commentators to the proverbial man in the street, recognize the serious implications of the problems posed. For the final decision of this issue in favor of compulsory unionism may mark a decisive and fateful turning-point in the history of limited, republican government. *See* Petro, "Sovereignty and Compulsory Public-Sector Bargaining", 10 *Wake Forest L. Rev.* 25 (1974). In short, it is difficult to define in broad terms a subject-matter of greater or more immediate public concern than whether a governmental agency should enter into an arrangement which conditions the employment of dissenting public employees upon their financial support of a labor union.

More specifically, in this case the precise purpose of Holmquist's appearance before the Board was to bring the issue of compulsory unionism *to impartial public attention.* As he stated to the Board:

> We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. *2) The findings of this study be made public.* 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal. *4) The results of this written ballot be made public.*
>
> We feel this study necessary because neither the board's negotiators * * * nor Madison Teachers, Inc. * * * has properly addressed the serious issue of fair share and agency shop. We find much confusion in the proposal as it stands and even more on the part of the teachers' interpretations of it.

> * * * *Due to this confusion, we * * * ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible.*

69 Wis. 2d at 206-07, 231 N.W.2d at 210 (emphasis supplied). Even if this statement had been made explicitly in the interest of nonunion teachers alone, its content would nevertheless place it squarely within the sphere of public interest protected by the First and Fourteenth Amendment guarantee of petition. *See Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-40 (1961). In fact, however, Holmquist presented the request for a public study of "fair share" in his capacity as a citizen representing other citizens, as well as a nonunion teacher representing union members in addition to nonunion teachers.* This is clear from his disclaimer of partiality that *"we wish to take no stand on the* ['*fair-share*'] *proposal itself,* but ask only that all alternatives be presented clearly * * * to the general public * * *." 69 Wis. 2d at 207, 231 N.W.2d at 210 (emphasis supplied). It is hard to imagine, then, how Holmquist's statement could have been more carefully or specifically directed to the public interest in fully opening the "fair-share" debate to general citizen scrutiny, and less to any parochial interest of nonunion teachers in presenting their special position to the Board.

Therefore, even though the issue of "fair share" is concededly a matter "subject to collective bargaining" under Wisconsin law, this Court should hold that it is

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*From the record, it appears that Holmquist was representing a group composed, in significant part, of union members as well as nonunion teachers. *See* 69 Wis. 2d at 204-05, 231 N.W.2d at 209.

also – and was at the Board meeting in question – a matter of *public* interest for First and Fourteenth Amendment purposes.

C. Neither the General Circumstances of the Board Meeting nor Holmquist's Specific Acts Thereat Exhibited Any of the Indicia Rationally Necessary for a Finding That "Negotiation" or "Bargaining" Took Place Between Holmquist and the Board.

Not only was the Board meeting a public meeting at which matters of public interest were discussed; and not only did Holmquist participate in the public portion of that meeting as a citizen raising a matter of public concern for the benefit of all other citizens; but also neither the meeting itself nor Holmquist's actions thereat exhibited any of the indicia which this Amicus submits must be present for a rational finding that "negotiation" or "bargaining" took place between Holmquist and the Board. The Wisconsin Supreme Court, to be sure, cited several elements in support of its erroneous finding that "that meeting certainly was part of the negotiation process" and that Holmquist's presentation of the statement "was in fact negotiating". 69 Wis. 2d at 213-14, 215, 231 N.W.2d at 213-14, 214. But these elements, either singly or in any combination, are insufficient to support its decision.

First, the Wisconsin Court found that Holmquist's "statement went to the very heart of the negotiations." *Id.* at 214, 231 N.W.2d at 214. This, however, confuses *negotiating* with *discussing what others are negotiating.*

For *A* to talk to *B* about some matter which is the subject of negotiations between *B* and *C* is not necessarily for *A* to negotiate with *B*. And any "finding" to the contrary is simply nonrational.

Secondly, the Wisconsin Court emphasized that Holmquist "was speaking for an *ad hoc* group which was opposed to including a fair-share agreement in any contract being negotiated at that time." *Id.* at 215, 231 N.W.2d at 214. In fact, the record does not support this characterization of Holmquist's *public statement* (whatever may have been his *personal position*), especially in light of the explicit disclaimer that his group "wish[ed] to take *no stand* on the ["fair-share"] proposal itself * * *." *Id.* at 207, 231 N.W.2d at 210 (emphasis supplied). But be that as it may, for *A* to represent *X* and *Y* in a discussion with *B* does not necessarily imply that *A* is negotiating with *B* on their behalf. And any "finding" to the contrary is simply nonrational.

Thirdly, the Wisconsin Court strongly implied that Holmquist was representing public employees directly interested in " 'delet[ing the "fair-share" proposal] from the agreement.' " *Id.* at 214, 231 N.W.2d at 214 (quoting from the opinion of the Wisconsin trial court). Yet for *A* to represent *X* and *Y* with respect to even their most important interests in a discussion with *B* cannot of itself mean that *A* is negotiating with *B* over those interests – no matter how aggressively and insistently *A* champions them. And any "finding" to the contrary is simply nonrational.

Fourthly, the Wisconsin Court emphasized that Holmquist's statement "criticized [the union's] handling of the negotiations [on the 'fair-share' issue]".

Id. at 215, 231 N.W.2d at 214. In fact, the statement criticized *both* the Board *and* the union for not "properly address[ing] the serious issue of fair share and agency shop" in their negotiations. *Id.* at 207, 231 N.W.2d at 210. But for *A* to criticize *B* with respect to how *B* and *C* are negotiating on some matter is not necessarily for *A* to negotiate with *B*. And any "finding" to the contrary is simply nonrational.

Fifthly, the Wisconsin Court considered it important that Holmquist's statement "imparted * * * a request that the whole fair-share issue be deferred" and suggested "how the issue should be handled" in the future. *Id.* at 215, 231 N.W.2d at 214. In fact, the record shows that Holmquist directed his statement to *both* the Board *and* the union. *Id.* at 206, 231 N.W.2d at 210. But be that as it may, for *A* to suggest to *B* how *B* and *C* should negotiate on some matter is not necessarily for *A* to negotiate with *B*. And any "finding" to the contrary is simply nonrational.

Sixthly, the Wisconsin Court found that Holmquist's presentation "was more than a mere statement of a position; it was an argument for it." *Id.* at 215, 231 N.W.2d at 214. If anything, the record discloses that the statement, far from presenting an "argument" or "position", merely suggested a method whereby impartial fact-finders might study and publicize a matter on which Holmquist believed public-school teachers and the general public were too confused to form a coherent "position" or "argument". *Id.* at 206-07, 231 N.W.2d at 210. But even if the Wisconsin Court's characterization is correct, it forms no more than one premiss of a non sequitur. For *A* to cast a statement to *B* in the form of an argument, or to make

an argument to *B* in support of a position, is not necessarily to negotiate with *B* over matters addressed by the argument. And any "finding" to the contrary is simply nonrational.

Lastly, the Wisconsin Court made much of its findings that an "impasse * * * had been reached in the negotiations" between the Board and the union, that "several [union] members [were] present at the board meeting", that the union had "pickets present", and that "[union] representatives address[ed] the board on subjects of collective bargaining negotiations". *Id.* at 213, 231 N.W.2d at 213. To be sure, all of this may have made *what the union representatives said at the meeting* a "part of the negotiation process." *Id.* at 214, 231 N.W.2d at 213-14. But it could not automatically have transformed the act of a third party *unconnected with the union* into an act of negotiation if it otherwise were not such in its own right. For *A* to talk to *B* at a time when representatives of *C* are negotiating with *B* is not necessarily for *A* to negotiate with *B*. And any "finding" to the contrary is simply nonrational.

In sum, each of the seven elements upon which the Wisconsin Court relied for its finding that Holmquist's actions constituted "negotiation" or "bargaining" is a nonrational predicate for the Court's conclusion.

The Wisconsin Court did identify a single element relevant to the question of "negotiation"; but it inexplicably failed to give that element even minimal consideration, let alone controlling weight. At one point the Court defined "negotiate" as

> to communicate or confer with another *so as to arrive at the settlement of some matter:* meet with another *so as to arrive through discussion at some*

> *kind of agreement or compromise about something: come to terms* * * * by meetings and discussions * * *.

69 Wis. 2d at 212-13, 231 N.W.2d at 213 (emphasis supplied), *quoting Webster's New Int'l Dictionary* (3d ed.). This definition, concededly, is appropriate under the Wisconsin statute, which itself defines "collective bargaining" (in pertinent part) as

> performance of *the mutual obligation* of a municipal employer * * * and the representatives of its employes, to meet and confer at reasonable times, *in good faith*, with respect to wages, hours and conditions of employment *with the intention of reaching an agreement* * * * *includ[ing] the reduction of any agreement reached to a written and signed document.*

Wis. Stat. § 111.70(1)(d) (emphasis supplied). Indeed, the definition is appropriate under most public- and private-sector collective-bargaining statutes, which generally define "negotiate" or "bargain" as meeting to discuss certain matters *with the good-faith intent to come, if possible, to a binding agreement. E.g.*, National Labor Relations Act. §§ 8(a)(5), 8(b)(3), 8(d), 29 U.S.C. §§ 158(a)(5), 158(b)(3), 158(d) (1970); Minnesota Public-Employment Act, Minn. Stat. §§ 179.63[16], 179.65[4], 179.66[2], 179.68[2(5), 3(3)]; Hawaii Public-Employment Act, Hawaii Rev. Stat. §§ 89-2(5), 89-9(a-c), 89-13(a)(5), 89-13(b)(2). Yet, although appropriate in the abstract, this definition cannot rationally be applied to characterize the specific facts of the instant case.

At the public meeting in issue here, the Board had no statutory duty, and Holmquist had no statutory right to require it, to "confer * * * in good

faith * * * with the intention of reaching an agreement * * *." Wis. Stat. § 111.70(1)(d). And, as the Wisconsin Court acknowledged, while the Board "listened to [Holmquist's] statements", "[t]here was no other exchange between [him] and any member of the board"; and his "petitions * * * were never presented to the board." 69 Wis. 2d at 202, 207, 231 N.W.2d at 208, 210. Certainly the record does not disclose that the Board entered into any agreement with Holmquist – for, indeed, as the record does show, Holmquist did not tender any proposal upon which *he* sought agreement. Rather he merely suggested that *the Board and the union themselves agree* to defer the "fair-share" question until a proper, impartial study had been made and publicized.

What the record also demonstrates, moreover, is that, notwithstanding Holmquist's appearance at the public meeting, the Board continued to negotiate in good faith with the union, ultimately agreeing to a settlement *on the union's terms.* As the Wisconsin Court described the negotiations prior to the public meeting,

> [t]wo of [the unresolved issues between the union and the Board] were considered of overriding importance by both sides: (1) The fair-share provision, and (2) the provision for binding arbitration of nonrenewal of teacher contracts and teacher dismissals. The board had opposed both of these issues throughout the negotiations. However, [prior to the public meeting], the chairman of the board's negotiating team indicated, informally and unofficially, to the chairman of [the union's] negotiating team that there was "no way" arbitration for dismissals and nonrenewals would

> be accepted by the board, but there was a "distinct possibility" the fair-share provision could be accepted * * * if [the union] would withdraw its arbitration proposal.
>
> On the other hand, at the [hearing before the Wisconsin Employment Relations Commission] in this case, the chairman of [the union's] negotiating team testified that the union's bargaining strategy was to lead the board to believe that [the union's] primary interest was in fair share when in fact it was arbitration. If this strategem were successful, [the union] could at some point offer to "sacrifice" fair share for arbitration and celebrate the result.

69 Wis. 2d at 204, 231 N.W.2d at 209. At the negotiations subsequent to the public meeting, the Board retreated from its former position, made a concession, and offered the arbitration proposal – which the union accepted. *Id.* at 207, 231 N.W.2d at 210-11. Thus, as a matter of fact undisputed in the record, Holmquist's appearance at the meeting in no way interfered with the collective-bargaining process.

Therefore, on the basis of all of the foregoing considerations – from the public nature of the Board meeting and the public interest in the subject-matter of Holmquist's statement, to the failure of the Wisconsin Court properly to apply the one relevant criterion of "negotiation" or "bargaining" – this Court should hold that Holmquist's appearance at the meeting, as a matter of constitutional law and fact under the First and Fourteenth Amendments, constituted an exercise of the freedom of petition.

V.

BECAUSE THIS CASE DOES NOT PRESENT THE SPECIAL CIRCUMSTANCES UNDER WHICH AN EXERCISE OF THE FREEDOM OF PETITION MAY BE REGULATED OR INCIDENTALLY LIMITED, THE CONSTRUCTION AND APPLICATION OF THE CHALLENGED WISCONSIN STATUTORY PROVISIONS BY THE WISCONSIN SUPREME COURT ARE REPUGNANT *PER SE* TO THE FIRST AND FOURTEENTH AMENDMENTS.

Since under the facts of this case Holmquist's appearance at the Board meeting constituted an exercise of his freedom of petition, the burden is upon the State to demonstrate the existence of special circumstances justifying the regulation or incidental limitation of that exercise. *E.g., Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *Carroll* v. *Princess Anne County*, 393 U.S. 175, 181 (1968); *Freedman* v. *Maryland*, 380 U.S. 51, 57 (1965); *United States* v. *CIO*, 335 U.S. 106, 139-40 (1948) (Rutledge, J., concurring). The opinion of the Wisconsin Supreme Court is devoid of such a showing.

A. The decision of the Wisconsin Supreme Court Cannot Be Rationalized as the Enforcement or Enunciation of a "Time, Place, and Manner" Regulation.

This Court has often held that the First and Fourteenth Amendments do not preclude government from imposing reasonable "time, place, and manner"

regulations upon speakers – provided that the regulations further a substantial state interest unrelated to the restriction of communication, and do not invidiously discriminate among speakers or ideas. *E.g., Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 209 (1975), *citing Adderley* v. *Florida,* 385 U.S. 39 (1966); *Cox* v. *Louisiana,* 379 U.S. 559 (1965); *and Kovacs* v. *Cooper,* 336 U.S. 77 (1949). Here, the record demonstrates beyond dispute that Holmquist complied with all applicable "time, place, and manner" regulations. As the Wisconsin Court noted, "Holmquist completed a registration form stating that he wished to speak during [the portion of the meeting devoted to public appearances]", and, when his turn came, "was allowed to speak." 69 Wis. 2d at 205-06, 231 N.W.2d at 209-210.

The order of the Wisconsin Employment Relations Commission upheld by the Wisconsin Supreme Court cannot be rationalized as merely a *new* "time, place, and manner" regulation, either. For, as demonstrated *infra,* that order is an attempt by the State, not to regulate *procedure* only, but to control the *substance* of speech and petition – indeed, *to discriminate invidiously among speakers and ideas in order to further illegitimate goals directly related to the restriction of communication.*

B. The Decision of the Wisconsin Supreme Court Cannot Be Rationalized as a Regulation of Conduct Unrelated to Speech and Petition.

In *United States* v. *O'Brien,* this Court defined the limits of permissible governmental infringement upon protected liberty in the following terms:

> *[W]hen "speech" and "nonspeech" elements are combined in the same course of conduct,* a sufficiently important governmental interest *in regulating the nonspeech element* can justify *incidental* limitations on First Amendment freedoms.

391 U.S. 367, 376 (1968) (emphasis supplied); *accord, Konigsberg* v. *State Bar,* 366 U.S. 36, 50-51 (1961). The Commission's order, however, does not impose restrictions merely on conduct *unrelated to speech;* for the course of conduct involved when nonunion teachers "appear and speak at meetings of the Board * * * on matters subject to collective bargaining" contains *no* element not integrally related to protected speech and petition.

This Court has characterized a *telegram* from a citizen to a public official as a *"pure* form of expression" involving "free speech *alone*", rather than "expression mixed with particular conduct". *Cox* v. *Louisiana,* 379 U.S. 559, 564 (1965) (emphasis supplied). And it has held that such a telegram is also a form of free petition. *Bridges* v. *California,* 314 U.S. 252, 277 (1941). Certainly, then, *the reading of a statement* on matters of public concern by a citizen to public officials at a public meeting is equally a form of "pure" speech and petition, not regulable conduct.

That being so, the limitation imposed by the Commission's order, as affirmed by the Wisconsin Supreme Court, is unconstitutional *per se.* The "balancing test" described in *O'Brien,* after all, applies only to *indirect* infringements upon speech which arise out of valid regulation of *conduct unrelated to speech.* Therefore, it is inapplicable by hypothesis to a *direct*

infringement on *pure* speech and petition; and such an infringement is constitutionally invalid *no matter what governmental interests it serves.*

C. Even if Holmquist's Acts Could Rationally Be Characterized as Regulable Conduct Rather Than as Pure Speech and Petition, the Decision of the Wisconsin Supreme Court Cannot Be Rationalized as a Valid Regulation of That Conduct Because the Governmental Interests Advanced in Its Support Involve Direct Suppression of Communication.

In *O'Brien*, this Court held that

> a governmental regulation is sufficiently justified * * * if it furthers an important or substantial governmental interest * * * *unrelated to the suppression of free expression* * * *.

391 U.S. at 377 (emphasis supplied). State action aimed directly, purposefully, or inevitably at the restraint of protected liberty or of conduct necessarily related thereto is unconstitutional *per se*, and can never be justified by "interest balancing". *See, e.g., Bates* v. *City of Little Rock*, 361 U.S. 516, 523, 526-27 & n.11 (1960); *NAACP* v. *Alabama* ex rel. *Patterson*, 357 U.S. 449, 464-65 (1958); *Shelton* v. *Tucker*, 364 U.S. 479, 486-87 & n.7 (1960). And it is for the State to identify a legitimate purpose subserved by the regulation. *Bates*, 361 U.S. at 525; *Gibson* v. *Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963). Two purportedly legitimate and substantial governmental interests subserved by the Commission's order have

been put forward: one, the interest in avoiding "relative chaos in labor management relations"; and the other, the interest in enhancing the "unity of collective clout" which "advances the welfare of public employees". 69 Wis. 2d at 212 (opinion of the Court), 224 (dissenting opinion), 231 N.W.2d at 213, 219. Neither of these interests is legitimate, because neither is sufficiently unrelated to the suppression of free expression.

The purported interest in "avoiding chaos" is simply an euphemism *for restricting the speech of all public employees not voluntarily affiliated with a majority labor union* on matters subject to collective bargaining *in order to enhance the influence of union members at the expense of dissenters.* Therefore, even if Holmquist's actions could rationally be characterized as regulable conduct, the suppression of such conduct by the Commission's order makes this a case "where the alleged governmental interest in regulating conduct arises in some measure *because the communication* * * * *integral to the conduct is itself thought to be harmful*" (or, suppressing the communication integral to the conduct is itself thought to be beneficial). *O'Brien*, 391 U.S. at 382 (emphasis supplied). And in such a case, the governmental interest advanced can *not* support the infringement on speech. *Id., citing Stromberg* v. *California*, 283 U.S. 359 (1931). Indeed, this Court has already indicated in a closely related context that government has no legitimate interest in enhancing the political influence of one group of citizens to the detriment of another. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the voice of others", this Court held most recently, "is *wholly*

foreign to the First Amendment * * *." *Buckley v. Valeo*, ___ U.S. ___, ___, 46 L. Ed. 2d 659, 704-05 (1976) (emphasis supplied). The applicability of this principle is especially compelling here since the Commission's order must have the inevitable effect of stifling speech on matters of the most intense public concern directly related to the process of self-government in the State of Wisconsin. Part IV(A-B) *supra*. The unconstitutionality of this result is patent. For "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). And "[t]he public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment * * *." *Pickering* v. *Board of Educ.*, 391 U.S. 563, 573 (1968).

The purported state interest in public employees' "collective clout" (or "bargaining power") is also illegitimate in the special context of public-sector labor relations. In *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), this Court made unmistakably clear that considerations of employee "bargaining power" can play no role in governmental employment policies. Rejecting the application of the Norris-LaGuardia Anti-Injunction Act to a dispute between the United States (as operator of certain mines) and the mine workers' union, this Court noted that that Act's statement of public policy

> predicates [its] purpose * * * on the contrast between the position of the "individual unorganized worker" and that of the "owners of property" who have been permitted to "organize

> in the corporate and other forms of ownership association," and on the consequent helplessness of the worker "to exercise actual liberty of contract * * * and thereby to obtain acceptable terms and conditions of employment." The purpose of the Act is said to be to contribute to the worker's "full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment * * *." *These considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees.*

Id. at 274 (emphasis supplied). If considerations of "bargaining power" "obviously do not apply to the Government as an employer", it follows that government cannot advance such considerations to justify the suppression of some of its employees' First and Fourteenth Amendment freedoms. And nowhere is that conclusion more compelling than with respect to freedom of petition. As one lower court noted, while

> the private employee relies on concerted action through collective bargaining to protect himself from arbitrary and discriminatory action by the employer, the State and its officials are always prohibited such conduct when dealing with its citizen-employees by the Constitution. * * * [W]hile private employees must rely upon collective bargaining and other concerted activities to change management policies, *the public employee always has the guaranteed political avenues, either individually through the ballot box or together through "petition," to effect a change* * * *.

Alaniz v. *City of San Antonio*, 80 L.R.R.M. 2983, 2985 (W.D. Tex. 1971) (footnote omitted; emphasis supplied). If public employees have no constitutional claim to a special mechanism to enhance their "bargaining power" *vis-a-vis* government in part *because they can exercise a protected freedom of petition*, then necessarily there can be no legitimate state interest in enhancing the "bargaining power" of some of those employees *by abridging others' freedom of petition.*

Admittedly, the "bargaining power" *of unions as entities* may in fact be limited where all public employees exercise an equal freedom of petition notwithstanding their union membership or non-membership. But this provides no legal basis for stifling the fundamental freedoms of nonunion employees in order to strengthen unions. For there has never been, and as a matter of constitutional law could never be, any public interest in enhancing the power of any private organization as against government – especially where to do so inevitably involves government in the suppression of personal liberties which the Constitution requires it to defend. *Cf. Coppage* v. *Kansas*, 236 U.S. 1, 16-17 (1915), *with* Petro, "Sovereignty and Compulsory Public-Sector Bargaining", 10 *Wake Forest L. Rev.* 25 (1974).

D. Even if Valid Governmental Interests in Regulating Conduct Were Involved Here, the Decision of the Wisconsin Supreme Court Cannot Be Rationalized Because the Limitation That Decision Imposes Upon Freedom of Petition Is not the Least-Restrictive Alternative Available.

The *O'Brien* decision also points out that, even if a governmental interest in some regulation of conduct is substantial and unrelated to the suppression of free speech, the regulation will nevertheless be invalid unless

> the incidental restriction on * * * First Amendment freedoms *is no greater than is essential to the furtherance of that interest.*

391 U.S. at 377 (emphasis supplied). This Amicus submits that the legitimacy of any governmental interest in compulsory public-sector collective bargaining through "exclusive representation" is subject to grave doubt. Petro, "Sovereignty and Compulsory Public-Sector Bargaining", 10 *Wake Forest L. Rev.* 25 (1974). But even if this Court assumes *arguendo* the existence of a valid interest in collective *negotiations*, it must none the less find the order of the Wisconsin Employment Relations Commission fatally overbroad. For that order purports to suppress, not only *negotiations* by nonunion teachers, but also *all petitions* on matters arguably "subject to collective bargaining" – which under Wisconsin law includes "wages, hours and conditions of employment" *and* all "subjects reserved to management and direction of the [public employer]" "insofar as the manner of exercise of such functions affects the wages, hours and conditions of

employment of the employees." Wis. Stat. § 111.70(1)(d). The dissent below correctly noted the extreme nature of this prohibition:

> [W]hat matters are subject to collective bargaining? * * * Suppose the teacher wishes to speak on class size or teachers' aides, the establishment of summer programs, school reading projects, in-service training, or the special treatment and handling of problem students. Are these matters subject to collective bargaining on which the board is restricted from receiving information from teachers other than the majority representative of its employees? * * * It is in this sense that the * * * order is vague, not meaning that it cannot be understood and applied by this school board to the facts here, *but because the difficulty of locating its outer limits will have a chilling effect both on the right of teachers to speak and school boards to listen on topics, arguably relatable to bargaining, but directly concerned with the well-being of school children and the community.* The prudent school board would resolve doubts against the right of an individual teacher to speak on marginal or in-doubt topics, and that is what is meant by having a chilling effect.

69 Wis. 2d at 223, 231 N.W.2d at 218-19 (emphasis supplied).

The Commission's order goes far beyond what would rationally be necessary to prevent unauthorized *negotiations.* To achieve *that* end, the order need have required no more than that the Board refrain from discussing matters "subject to collective bargaining" with nonunion teachers *with the intent to enter into a binding agreement with them as individuals or ad hoc groups separate from the "exclusive representative".*

(Such an order, of course, would have found no factual basis in the record, which clearly demonstrates that the Board never entered into any discussions with Holmquist, let alone discussions leading towards a binding agreement. But the very absence of such factual support emphasizes the excessively broad and indiscriminate character of the order which the Commission did enter and which the Wisconsin Supreme Court sustained.)

Under the leading decisions of this Court, the Commission's blanket infringement on First and Fourteenth Amendment freedoms cannot stand. Even if Holmquist's actions combined elements of regulable conduct with protected speech and petition, the Commission's order would nevertheless be invalid unless it "specifically bar[red] only the conduct deemed obnoxious and [was] carefully and narrowly aimed at that forbidden conduct." *Gregory* v. *City of Chicago,* 394 U.S. 111, 118 (1969) (Black, J., concurring). On its face and as applied here, however, the order is *not* "narrowly drawn to prevent the supposed evil" to which it is ostensibly addressed. *Cantwell* v. *Connecticut,* 310 U.S. 296, 307 (1940). Rather, it "pursue[s its purpose] by means that broadly stifle fundamental liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). This is impermissible. For where fundamental freedoms are concerned, nothing is more clear than that governmental regulations must be "highly selective"; constitute "sensitive tools"; and regulate "only with narrow specificity" and "[p]recision". *Louisiana* ex rel. *Gremillion* v. *NAACP,* 366 U.S. 293,

296 (1961); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967); *NAACP* v. *Button*, 371 U.S. 415, 433, 438 (1963); *accord*, *United States* v. *Robel*, 389 U.S. 258, 267-68 (1967); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 508 (1964); *Talley* v. *California*, 362 U.S. 60, 64, 66-67 (1960) (opinion of the Court; Harlan, J., concurring); *Schneider* v. *Town of Irvington*, 308 U.S. 147-162-64 (1939); *Lovell* v. *City of Griffin*, 303 U.S. 444, 451 (1938).

Moreover, if wholesale suppression of First and Fourteenth Amendment freedoms was deemed invalid in the private-sector contexts in which the latter cases arose, it must surely be deemed invalid here, where the Commission's order strikes directly at the sensitive *political* relationship between citizens and their government. A regulation which broadly stifles speech *between private parties* is certainly obnoxious to the Constitution; but such a regulation has only a slight capacity for promoting the mischief to the prevention of which the First Amendment was directed, in comparison to a regulation that wantonly suppresses speech and petition *between citizens and governmental officials. See* Part VI *infra.*

E. The Decision of the Wisconsin Supreme Court Cannot Be Rationalized Under the "Clear-and-Present-Danger" Test.

Finally, the Wisconsin Court argued that

> [t]he principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts; the first amendment

> rights of those persons are, to that extent, thereby infringed. *But the gravity of that evil was considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations.*

69 Wis. 3d at 211-12, 231 N.W.2d at 212-13 (emphasis supplied), *citing Dennis* v. *United States*, 341 U.S. 494, 510 (1951). This application of the "clear-and-present-danger" test is erroneous.

The "clear-and-present-danger" test is appropriately employed to determine when expression *which may be a nexus to suppressible conduct* is itself subject to restraint or punishment. As this Court early noted, "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger *that they will bring about the substantive evils that* [*the legislature*] *has a right to prevent.*" *Schenck* v. *United States*, 249 U.S. 47, 52 (1919) (emphasis supplied). Under this test, a court must determine *both* that the speech sought to be restrained is advocating action that government may suppress, *and* that there is *imminent* danger of that evil taking place as a result of the speech. "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges* v. *California*, 314 U.S. 252, 263 (1941).

Clearly, the test cannot be satisfied under the circumstances of this case. The Wisconsin Court identified the substantive "evil" here as "relative chaos in labor-management relations" – by which it apparently meant "negotiation" or "bargaining" with

many groups of employees. But for that Court irrebuttably to presume that every act of petition by a nonunion employee which relates to matters "subject to collective bargaining" will necessarily constitute the sort of expression capable of inducing such "chaos" is simply nonrational. Long ago, this Court pointed out that "no clear and present danger of * * * breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter." *Thornhill* v. *Alabama*, 310 U.S. 88, 105 (1940). That observation is equally applicable to petitions of nonunion public employees presented at public meetings, and to the effect of those petitions on "labor stability". Certainly it is an apt description of what the record in this case discloses.

The opinion of the Wisconsin Court presumes that the Board, when faced with a petition by nonunion employees, will act contrary to its duty under Wisconsin law not to negotiate with those employees. There is no rational basis for this presumption in the record. Indeed, quite the opposite. The Board did not negotiate with Holmquist; nor did it refuse to negotiate with the union. And the negotiations between the Board and the union proceeded, without any peculiar delay or difficulty, to a final and satisfactory resolution of the issues and a binding collective agreement. How the Wisconsin Court could conclude, then, that Holmquist's petition, let alone all future petitions of that kind, might validly be suppressed passes all understanding.

The fundamentally defective nature of the Wisconsin Court's reasoning appears in even more stark relief against the background of what Holmquist actually sought to achieve through his petition. Holmquist did not ask the Board to bargain with him, to refuse to bargain with the union, or to do anything else that could rationally be characterized as interfering with the conduct of collective negotiations as prescribed by state law. Rather, he merely advocated that the negotiating parties themselves agree to defer the "fair-share" question for a year, pending an impartial study. Such a request is not and cannot be *per se* a substantive "evil". To be sure, the Board might have been convinced to press the point in negotiations with the union after hearing Holmquist's petition; but the union could have had no claim to complain even of that result providing that the Board continued (as it did) to negotiate in good faith. This Court has often noted that "the group in power at any moment may not impose * * * sanctions on peaceful" exercises of First and Fourteenth Amendment freedoms "merely on a showing that others may thereby be persuaded to take action inconsistent with its interest." *Thornhill*, 310 U.S. at 104. That such persuasion may influence one party's position in "negotiations" or "bargaining" with another cannot be a valid reason for departing from this sound principle. "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society." *Id.* But this inherent capacity of speech to persuade cannot permit a State to limit exercises of First and Fourteenth Amendment

freedom by carving out special domains where only one or another select group is allowed to "negotiate" or "bargain" on some topic; for then government could gradually destroy all free discussion. The First and Fourteenth Amendments, however, absolutely preclude such a result. The "free trade in ideas" which they protect "means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins,* 323 U.S. 516, 537, *rehearing denied,* 323 U.S. 819 (1945). Indeed, it could not be otherwise; for "the whole history of the problem [of free speech and petition] shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given." *Id.*

Therefore, it is clear that this case presents none of the special circumstances under which an exercise of freedom of petition may constitutionally be regulated or incidentally limited in the pursuit of valid governmental interests. That being so, this Court must find that the order of the Wisconsin Employment Relations Commission affirmed by the Wisconsin Supreme Court is repugnant *per se* to the First and Fourteenth Amendments.

VI.

THE DECISION OF THE WISCONSIN SUPREME COURT IS REPUGNANT TO THE FREEDOM OF POLITICAL PARTICIPATION, UPON WHICH THE VERY LEGITIMACY OF REPRESENTATIVE GOVERNMENT RESTS.

The Wisconsin Court's decision not only offends the freedom of petition secured by the First and Fourteenth Amendments, but also strikes at the freedom of political participation which lies at the heart of the republican form of government which the Constitution ordains.

A. Public-Sector Labor Relations Are an Inextricable Part of the Political Process.

No one can rationally deny that public-sector labor relations are part of the political process. Judicial decisions generally define "political" as

> [o]f or pertaining to * * * the conduct of government * * *; of or pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of government * * *
>
> [o]f or pertaining to the exercise of the rights and privileges or the influence by which the individuals of a state seek to determine or control its public policy; having to do with the organization or action of individuals, parties, or interests that seek to control the appointment or action of those who manage the affairs of a state * * *.

Webster's New Int'l Dictionary (2d ed. unabg. 1949), *quoted in Akio Kuwahara* v. *Acheson*, 96 F. Supp. 38, 41 (S.D. Cal. 1951); *State* ex rel. *Maley* v. *Civic Action Comm.*, 238 Iowa 851, 857, 28 N.W.2d 467, 470 (1947); *Norton* v. *Letton*, 271 Ky. 353, 360, 111 S.W.2d 1053, 1057 (1937); *Sorenson* v. *Superior Court*, 31 Ariz. 421, 424, 254 Pac. 230, 231 (1927); *Lockheed Aircraft Corp.* v. *Superior Court*, 28 Cal. 2d 481, 484-85, 171 P.2d 21, 24 (1946). The process of structuring public-sector labor relations quite directly "pertains to the conduct of government", and is substantially more than merely "incidental" to the performance of its functions. For, indeed, the process of establishing and administering terms and conditions of employment for those individuals who perform public services in large measure determines what the conduct of government will be with respect to those services. For these reasons, observers unanimously agree that, in the very nature of things, the public-employment relation is "essentially", "inherently", or "unavoidably" political – and that, in fact, public employment should be *defined* as a "political connection between the state and a group of citizens". D.T. Stanley, *Managing Local Government Under Union Pressure* 24 (1972); Project, "Collective Bargaining and Politics in Public Employment" (pt. 4), 19 *U.C.L.A.L. Rev.* 887, 1010, 1011-19 (1972); K. Hanslowe, *The Emerging Law of Labor Relations in Public Employment* 115 (1967); Dotson, "A General Theory of Public Employment", 16 *Pub. Admin. Rev.* 197, 209 (1956). *See also* Summers, "Public Employee Bargaining: A Political Perspective", 83 *Yale L.J.* 1156 (1974) (*passim*).

The question of compulsory unionism in public employment, then, is also a political question. Indeed, this Court has already indicated as much by saying that "[t]he right * * * to discuss, and inform people concerning, the advantages and disadvantages of unions * * * is protected not only as a part of free speech, *but as a part of free assembly.*" *Thomas* v. *Collins*, 323 U.S. 516, 532 (emphasis supplied), *rehearing denied*, 323 U.S. 819 (1945). If that is true with respect to unionism in the *private* sector, as *Thomas* held, it is true *a fortiori* with respect to unionism in the *public* sector. It is especially true at the present time, because of the ferment in public-sector labor relations caused by the recent spate of compulsory collective-bargaining laws enacted in many of the States. This Court has noted that, "[i]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. * * * Free discussion concerning the conditions in industry and the causes of labor disputed appears to us *indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.*" *Thornhill* v. *Alabama*, 310 U.S. 88, 102, 103 (1940) (emphasis supplied). How much more so is discussion "indispensable to the effective and intelligent use of the processes of popular government" where it deals with matters of labor policy in *public*-sector employment, need not be unduly emphasized.

In short, compulsory unionism for public employees is a matter of intense political concern which goes to the very heart of the American system of self-government.

B. All Citizens, Whether or not Public Employees and Whether or not Union Members, Have an Equal Interest and Right to Participate in Political Affairs.

The American system of representative, republican self-government embodies the Lockean presupposition that the state may act only for the *common* or *public* good. J. Locke, *Second Treatise on Government* § § 89, 110, 131, 135, 142. From this follows the precept that *all* of the people are entitled to an *equal* voice in the governmental process. *Id.* § 158. Equal representation is vital in the American scheme of government, because the ultimate authority of law, its binding character, depends in the final analysis upon the continuous assent of its subjects. A *republican* government has no existence separate from the people, but "rests on the foundation of a belief in rule by the people – not some, but all the people." *United Pub. Workers* v. *Mitchell,* 330 U.S. 75, 114 (1947) (Black, J., dissenting).

Certainly a scheme of political freedom can be structured on no basis other than an equality of representation and influence in the process of self-government. To be sure, the actions of government affect different individuals, classes, and interests in different and unequal ways. But there is no rational or objective means to measure these differences, or to compensate for them by "weighting" the voices of some differently from the voices of others. Therefore, the American system of government presumes – irrebuttably – that access to the political process must be available to all on an equal basis. And so this Court

has held, time and again. *E.g., Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Bullock* v. *Carter,* 405 U.S. 134 (1972); *Lubin* v. *Panish,* 415 U.S. 709 (1974); *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663 (1966); *Carrington* v. *Rash,* 380 U.S. 89 (1965); *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972); *Kusper* v. *Pontikes,* 414 U.S. 51 (1973); *Wesberry* v. *Sanders,* 376 U.S. 1 (1964); *Reynolds* v. *Sims,* 377 U.S. 533 (1964).

These cases recognize that fundamental to the very legitimacy of government under the American system is the freedom of political participation: the right to demand that the state function in the public interest and that each citizen enjoy an equality of legal opportunity to share in the process of government and to exercise a voice in the determination of public policy. *See* Call, "Federalism and the Ninth Amendment", 64 *Dick L. Rev.* 121, 122 (1960); Corwin, "The 'Higher Law' Background of American Constitutional Law" (pt. 1), 42 *Harv. L. Rev.* 149, 165 (1928).

The freedom of political participation, of course, extends to public employees as well as to all other citizens. On many occasions, this Court has "unequivocally rejected" the "suggest[ion] that teachers may constitutionally be compelled to relinquish the * * * rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work * * *." *Pickering* v. *Board of Educ.,* 391 U.S. 563, 568 (1968), *citing Wieman* v. *Updegraff,* 344 U.S. 183 (1952); *Shelton* v. *Tucker,* 364 U.S. 479 (1960);

and Keyishian v. *Board of Regents*, 385 U.S. 589 (1967). A teacher's mere nonmembership in a labor union cannot consistently with the Constitution change this result.

C. Whatever Its Validity May Be in Other Contexts, as Applied by the Wisconsin Supreme Court in This Case, the "Exclusive-Representation" Device Unconstitutionally Elevates the Political Influence of One Class of Citizens Over Another.

The decision of the Wisconsin Supreme Court is at war with this concept of political equality for all citizens. In substance, it affirms the power of the Wisconsin Employment Relations Commission to censor the speech and petition of certain citizens on the basis (i) of the *content* of their speech, and (ii) of their *associational* preferences. This is a complex constitutional violation arising at the intersection of the Due Process and Equal Protection Clauses of The Fourteenth Amendment. *See Chicago Police Dep't* v. *Mosley*, 408 U.S. 92, 94-99 (1972). But it is a violation for which a simple response is adequate: namely, that the stifling of political speech has no place in the American system of self-government, whatever interests it may purportedly serve.

Reference to a striking historical parallel is appropriate here. Before the Civil War, apologists for the "peculiar institution" of slavery rationalized their opposition to the receipt by Congress of petitions from Negro chattel slaves on the ground that "[a] slave is

not a citizen in the eye of the Constitution. *His political existence is merged in that of his master.*" *Congressional Globe*, 24th Cong., 2d Sess. 182 (1837) (Rep. Vanderpoel) (emphasis supplied). To them, this "merger" was an inherent characteristic of slavery with which freedom of petition whould be wholly inconsistent, and without which the exceptional political influence of the slave power would be in jeopardy. *See* A. Lincoln, Speech at Peoria, Ill., 16 Oct., 1854, in 2 *Collected Works* 268-69 (Basler ed. 1955) (criticizing slavery as giving the South unequal representation in Congress). The decision of the Wisconsin Court effects the same sort of "merger" by denying nonunion public-school teachers the privilege to petition their government – either as public employees or as citizens – on matters "subject to collective bargaining". To the extent that this merger is effective, it extinguishes those employees' "political existence" and denies them their "citizen[ship] in the eye of the Constitution" in the same way, if not to the same degree, that chattel slaves suffered such a disability under the "peculiar institution". In short, it imposes upon them a political badge or incident of slavery – *for the obvious purpose of enhancing the political "solidarity" and power of public-employee unions as against society.*

This result alone should be enough to condemn the decision of the Wisconsin Court as repugnant *per se* to the First and Fourteenth Amendments – indeed, to the entire Constitution as a charter of republican self-government. For "[t]he very idea of a government, republican in form, implies a right on the part of its citizens" – *all* of its citizens – "to petition for a redress of grievances." *United States* v. *Cruikshank*, 92

U.S. 542, 552 (1876). To deny that right to any citizen is to except him from the most basic protection of the Constitution, and to violate the fundamental duty of every free government – indeed, to deny the very existence of a republican government in so far as he is concerned. And to countenance such a result is to draw into question the very legitimacy of our political institutions.

CONCLUSION

The decision of the Wisconsin Supreme Court should be reversed.

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IN THE

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No. 75-946

CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8, *et al.*,

Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
and
MADISON TEACHERS, INC.,

Appellees.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF WISCONSIN

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

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WISCONSIN EMPLOYMENT RELATIONS
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and
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Appellees.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* ON BEHALF OF NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, URGING REVERSAL

Pursuant to Rule 42 of the Rules of this Court, the National Right to Work Legal Defense Foundation hereby moves for leave to file the annexed brief *amicus curiae*, urging that the decision of the Supreme Court of Wisconsin be reversed. Appellee, Madison Teachers, Inc., is the only party that has withheld its consent to the filing of this brief.

INTEREST OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

The National Right to Work Legal Defense Foundation is an organization formed to protect the Right to Work, freedom of association, freedom of speech, and other fundamental liberties of ordinary working men and women where these basic rights are infringed by unconstitutional or other illegal practices in connection with compulsory union membership.

The National Right to Work Legal Defense Foundation is vitally interested in aiding any employee whose human and civil rights have been abridged or are about to be abridged, through the injustices arising out of compulsory unionism arrangements. Thus, it is concerned with protection of the legal right of any individual to express his views or the views of others with respect to the issue of joining or paying dues to a labor organization against his will.

There are fundamental liberties which are inherent under the Constitution of the United States. These liberties cannot be subordinated to the activities of any labor organization. In representing the individual members of the bargaining unit, a labor organization cannot expect to be able to suppress basic rights guaranteed under the Constitution of the United States and granted to every citizen, regardless of his occupation. The fundamental Constitutional right of an individual freely to speak out on public issues must not depend in any way upon his or her vocation, or upon membership or non-membership in a labor union or any other private organization.

The Foundation does not doubt that the appellant will fully argue their interest. However, the Foundation submits that it is the only one in a position to argue in

its annexed brief *amicus curiae* the position of those individuals to whom the appellees would deny free speech and whose constitutional rights have been abridged under the decision of the Wisconsin Court below. The Foundation is thus in a position, as advocate of all employees who wish to exercise their constitutional rights under the facts presented in this case, to contribute its assistance to the Court to properly set forth the issues involved and the broad ramifications that any decision of this Court might have on all public employees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-946

CITY OF MADISON JOINT SCHOOL
DISTRICT NO. 8, *et al.*,

Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION
and
MADISON TEACHERS, INC.,

Appellees.

ON APPEAL FROM A JUDGMENT OF THE
SUPREME COURT OF WISCONSIN

BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS *AMICUS CURIAE*

This brief *amicus* in support of the position of the appellant City of Madison, Wisconsin, and in support of the legal right of all of the individual employees in the United States, is filed by the National Right to Work Legal Defense Foundation with leave of this Court pursuant to Rule 42 of the Rules of this Court.

INTEREST OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

The interest of the National Right to Work Legal Defense Foundation in participating as *amicus curiae* in this case is set forth in the Motion for Leave to File *Amicus Curiae* Brief annexed hereto.

SUMMARY OF THE ARGUMENT

In this case, the basic issue before the Court is whether a state labor statute may require, consistent with the First and Fourteenth Amendments to the United States Constitution, a duly elected Board of Education to refuse to permit a teacher-employee citizen an opportunity to speak and present a petition to the Board on a matter subject to collective bargaining at a regular public meeting of such Board and during the portion of the meeting devoted to appearances by citizens.

At the very roots of our form of government is a basic guaranteed constitutional right to speak out on subjects of public interest and to petition for a redress of grievances. The expression by an individual of his views on public affairs is, and also has been, a matter considered by this Court to be within the most basic and precious rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

The content of what an individual has to say has never been subjected to regulation except that government has been permitted to regulate speech by imposing time, place, and manner regulations on the

availability of forum. The state statutes prohibiting speech on the basis of subject matter have been stricken because of their failure to meet constitutional standards absent grave and immediate danger to the interest of the State.

In this instance, there is nothing in the record that would support a finding of "grave and immediate danger" in what Mr. Holmquist said to the Board of Education. This Court has imposed a balancing test on First Amendment rights, and the Wisconsin Court below failed to apply that standard. It would, without a doubt, permit Mr. Holmquist's statement. Thus, the decision of the Wisconsin Court must be reversed.

Furthermore, if the Holmquist statement can be categorized as "negotiating", then the Wisconsin statute in question is too broad to survive constitutional scrutiny. The limitation of the freedoms set forth under the First and Fourteenth Amendments as espoused by the Wisconsin Supreme Court cannot be upheld under the rationale expressed by this Court in the past. It would therefore stand to reason that this limitation cannot be permitted to stand.

For these reasons, the decision of the Wisconsin Supreme Court below should be reversed.

STATEMENT

Appellant, Joint School District No. 8, City of Madison, Villages of Maple Bluff and Sherwood Hills, Towns of Madison, Blooming Grove, Fitchburg, and Burke, (hereinafter referred to as the "District") is a City School District and is a City Employer as defined in Section 111.70(1)(a), Wis. Stats. (1971), with its

principal office located in Madison, Wisconsin; and appellant, Board of Education of Joint School District No. 8 (hereinafter referred to as "Board of Education"), is an agent of the District and is charged with the possession, care, control, and management of the property and the affairs of the District. Madison Teachers, Inc., appellee, is a labor organization and represents the collective bargaining unit of the teachers in the District. The Wisconsin Employment Relations Commission, a party in the case in the state courts, has formally waived its right to participate herein.

The Board of Education and Madison Teachers, Inc., engaged in negotiations regarding wages, hours, and conditions of employment for the teachers in the bargaining unit for the calendar year, 1972. These negotiations took place from January 25, 1971, until December 14, 1971, when an agreement was reached between the parties.

On December 6, 1971, the Board of Education held a public, regularly scheduled Board meeting. At the public appearance portion of that meeting, Albert M. Holmquist, who was a teacher employed by the Board of Education and who was not a member of Madison Teachers, Inc., presented the results of a survey that he and a fellow teacher had taken. Mr. Holmquist at the time was a resident of the City of Madison.

Mr. Holmquist had filled out a card that had been given to him at the beginning of the meeting. This card was one that was given to all those individuals in attendance who wished to make a public appearance in order to make a statement before the Board of Education. Mr. Holmquist did not indicate on the registration card his topic of conversation. Notification of the subject matter upon which one wished to speak

was not a pre-requisite to being permitted to speak at the public meeting.

Prior to this meeting, Mr. Holmquist and thirteen other teachers had prepared a petition which they circulated among the teachers in forty-nine of the fifty schools in the District. They had obtained the signatures of a large number of the teachers in the School District requesting that the "fair-share" concept that was being negotiated be studied by an impartial committee composed of representatives from all concerned groups, so that this proposal could be clearly defined and clarified. The petition requested that the findings of the impartial committee be made public.

At the December 6, 1971, meeting, Mr. Holmquist read this petition to the Board of Education. The only conversation between Mr. Holmquist and the Board of Education was a question asking Mr. Holmquist if he intended to communicate the results of the petition to the Board when he had completed obtaining teacher signatures. In response to this question from the School Board president, Mr. Holmquist answered in the affirmative.

Mr. Holmquist, although permitted to read his petition before the Board of Education, did not engage in any discussion or argument before the Board concerning the "fair-share" concept. Though he stated that he represented an informal committee of seventy-two teachers in the District, the petition which he read was signed by over four hundred District teachers.

In January, 1972, Madison Teachers, Inc., filed a complaint with the Wisconsin Employment Relations Commission alleging that the Board of Education committed a prohibited labor practice when it listened to a teacher-employee at its regular meeting of

December 6, 1971. The Board of Education denied this allegation and on February 28, 1972, a hearing on the complaint was conducted by the Wisconsin Employment Relations Commission.

On September 13, 1972, the Commission issued findings of fact, conclusion of law, and an order in the matter. The Commission determined that the petitioner violated its duty to bargain in good faith with Madison Teachers, Inc., and thus committed an unfair labor practice under Section 111.70(3)(a) and (4) of the Municipal Employment Relations Act when it listened to a teacher-employee at its regular meeting.

The Commission, pursuant to this determination, ordered the Board of Education to cease and desist permitting any teacher-employee, other than representatives of Madison Teachers, Inc., from appearing and speaking "on matters subject to collective bargaining between the petitioner and Madison Teachers, Inc." at meetings of the Board of Education.

The City of Madison petitioned the .Dane County Circuit Court for review and that Court entered a decision on October 2, 1973, affirming the Commission and dismissing the Petition for Review.

On June 30, 1975, a divided Wisconsin Supreme Court affirmed the decision of the Circuit Court. The City of Madison petitioned for rehearing and on September 30, the State Supreme Court refused to reconsider its earlier finding.

ARGUMENT

I.

THE RIGHT TO PETITION A PUBLIC BODY AT A PUBLIC MEETING IS CONSTITUTIONALLY PROTECTED.

Any state statute that would require a Board of Education to refuse to hear a citizen, whether he be a teacher or not, on any subject at a public meeting, is subject to constitutional scrutiny. This Court, in *United States v. Cruikshank*, 92 U.S. 542, 552 (1876) said:

> The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. (This case was cited with approval in *DeJonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 260 (1937).)

The language of the First Amendment to the Constitution of the United States is explicit. It provides that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peacefully to assemble, and to petition the government for a redress of grievances." These fundamental First Amendment rights have been made applicable to the States through the "due process" clause of the Fourteenth Amendment. *Schneider v. New Jersey*, 308 U.S. 147, 60 S.Ct. 146 (1939) and *West Virginia State Board Education, et al. v. Barnette, et al.*, 319 U.S. 624, 63 S.Ct. 1178 (1943).

Freedom of speech and freedom to petition the government for a redress of grievances are rights which the writers of the Bill of Rights jealously preserved to

each citizen against any encroachment. The very purpose of the Bill of Rights was to remove certain subjects from the realm of political controversy, and to place them as legal principles to be applied to the courts. In *West Virginia State Board of Education, et al. v. Barnette, et al., supra,* this Court said in discussing prohibitions on freedom of speech:

> Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority. 319 U.S. at 641, 63 S.Ct. at 1186-87.

Mr. Justice John Paul Stevens, when he was a judge on the Court of Appeals for the Seventh Circuit, said in *Hanover Township Federation of Teachers, Local 1954 (AFL-CIO) v. Hanover Community School Corporation, et al.,* 457 F.2d 456 (7th Cir. 1972):

> The First Amendment protects the right to advocate, either individually or through an association, and also the association's right to engage in advocacy on behalf of its members. (citations omitted.) A State may not invade that constitutional protection, either by a general advance prohibition against certain forms of advocacy (citation omitted), or by attempting to punish the expression of views that it opposes. 457 F.2d at 459-60.

In *Garrison v. Louisiana,* 379 U.S. 64, 74-75, 85 S. Ct. 209,216 (1964), this Court said that "speech concerning public affairs is more than self-expression, it is the essence of self-government." Mr. Holmquist's appearance before and presentation to the Board of Education was the exercise of a right guaranteed by the First and Fourteenth Amendments. A law which would prohibit this exercise of that right under the circumstances here presented is a law which conflicts with the Constitution. There is no grave and immediate danger to any interest which would warrant such a prohibition on the freedom of an individual to speak to a public body. Concerning First Amendment rights, this Court said in *Thomas v. Collins,* 323 U.S. 516, 530, 65 S.Ct. 315, 322-23 (1945):

> That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice . . .
>
> For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely but by clear and present danger . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

Madison Teachers, Inc. has contended that the "fair-share" proposal was in dispute and hence there was in effect a labor dispute. If this is true, then a statement made about this dispute would be protected by the constitutionally guaranteed right to disseminate one's views as long as they do not present a grave and immediate danger to interests which the State can lawfully protect. Citing *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 59 S.Ct. 954 (1939), this Court said in *Thomas v. Collins*, "[t]he right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." 323 U.S. at 522, 65 S.Ct. at 324.

Even if what Mr. Holmquist said before the Board of Education could be considered an argument or discussion on his part, as opposed to the presentation of a petition or grievance to a public body, the First Amendment would protect Mr. Holmquist's statements because the free trade of ideas and the opportunity to persuade to action and not merely to describe facts, is a protected right. *Thomas v. Collins, supra.*

In a discussion of First Amendment rights in *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736 (1940), this Court said:

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economical

> truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. 316 U.S. at 95, 60 S.Ct. at 741.

This Court went on to say:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. 316 U.S. at 101-02, 60 S. Ct. at 744.

If the Board of Education had denied Mr. Holmquist the right to present his petition, he in effect, would have been thwarted in his effort to present to a public body a position on a significant issue of great controversy and public interest. While the subject of public employee collective bargaining is now receiving a great deal of attention not only from legislative bodies but from the public as well, so is the question of compulsory unionism agreements for these public employees. Abridgement of the right of one of these employees to discuss the matter of forced payment of union dues could be justified only where there was a clear danger of "substantive evils aris[ing] under circumstances affording no opportunity to test the

merits of ideas by competition for acceptance in the market of public opinion." 310 U.S. at 105, 60 S.Ct. at 745. There is, in this instance, no "substantive evil" or "clear and present danger" that could justify any restriction of the exercise of free speech by a teacher-citizen where the subject to be commented on was the payment of compulsory dues to a labor union. And to require the Board of Education to refuse to hear an individual who had something to say on that subject by finding a prohibited labor practice is in direct conflict with the intent and purpose of the Bill of Rights. As this Court said in *Bridges v. California*, 314 U.S. 252, 263, 62 S.Ct. 190, 194 (1941), the language of the First Amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

II.

REGULATION OF EXPRESSION ON THE BASIS OF CONTENT IS NOT PERMISSIBLE UNDER THE FIRST AMENDMENT.

The order of the Wisconsin Employment Relations Commission which required the School Board to prohibit any teacher other than a union representative from appearing and speaking at Board meetings "on matters subject to collective bargaining" is unconstitutional. "Matters subject to collective bargaining" are defined by Wisconsin Statute as "wages, hours, and conditions of employment." Sec. 111.70(1)(b), Wis. Stats.

We submit that a prohibition on speaking about "matters subject to collective bargaining" constitutes regulation of speech on the basis of the content or subject matter of that speech. Such a prohibition cannot withstand the dictates of the First Amendment to the United States Constitution. This Court recently reiterated that, although government may regulate speech by imposing time, place, and manner regulations on the availability of forums, it may not, under the First and Fourteenth Amendments, regulate expression on the basis of the content or subject matter of that expression. This Court said, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290 (1972).

The state statute in question has the effect of prohibiting teachers from expressing opinions, unless the union majority agrees with these opinions, on any subject "subject to collective bargaining." Since "wages" clearly falls in that category, the amount of district funds available as wages is a subject upon which all citizens, except a dissenting teacher, may express an opinion. The teacher must agree with the majority of the teachers, or be prohibited from speaking to the Board, on how his taxes will be spent. The same is true with "hours," and the possibility of year-round class instruction is a subject upon which all citizens, except a dissenting teacher, could express an opinion. The teacher must agree with the majority of the teachers, or be prohibited from advocating to the Board an innovative educational idea.

We submit that a state labor statute which reaches this far in the interest of protecting exclusive negotiator status in the further interest of preventing a "chaos in labor management relations" reaches too far. There is no evidence whatsoever in the record that such chaos existed or would have existed; and protecting against some speculative entity does not require elimination of public debate. It does not require the silence of all but the majority's view, nor does it require subordination of individual constitutional rights to collective statutory rights.

III.

FIRST AMENDMENT RIGHTS NOT RELINQUISHED BY TEACHERS.

A. Teachers Have the Same First Amendment Rights as Private Citizens.

As a private citizen, Mr. Holmquist had a protected First Amendment right to make a position statement to the Board of Education during a meeting open to the public. As a concerned citizen, he was entitled to submit opinions and arguments during the public portion of the meeting, and permitting him to do so should not subject the Board to a finding of an unfair labor practice. In fact, denying him such right might have subjected the Board to a federal civil rights action. *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992 (1975).

In *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), this Court said that teachers may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on

matters of public interest in connection with the operation of the public schools in which they work. . ." 391 U.S. at 568, 88 S.Ct. at 1734. Nowhere in the majority opinion of the Wisconsin Supreme Court below, 69 Wis.2d 200, 231 N.W.2d 206 (1975), is there any reference to this Court's opinion in the *Pickering* case. Had that Court squarely faced the decision of this Court in *Pickering*, it would have had to reach a different conclusion. There is no question that under the Wisconsin law, any private citizen, not a teacher, would have had the right not only to present a petition to the Board of Education but in fact discuss and argue the subject of a so-called "fair share" agreement; and, thus, the Wisconsin Municipal Employee Bargaining Law cannot act to deny a teacher-citizen's basic First Amendment right solely because the speaker is a member of the collective bargaining unit. The right of any teacher, or for that matter any other individual, to speak at a public meeting before a public body must be protected. To abridge this most basic and fundamental constitutional right because of artificial considerations is particularly pernicious when, as here, the forum and the speaker are so directly responsible for educating our children.

The State cannot interfere with the protection afforded by the Constitution, absent grave and immediate danger to interests which the State may lawfully protect. There is and was no grave and immediate danger presented by Mr. Holmquist's statement to the Board of Education. In *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215 (1952), in a concurring opinion in which Mr. Justice Douglas joined, Mr. Justice Frankfurter made some observations about the constitutionally guaranteed right of freedom of speech. He said:

> By limiting the power of the State to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakeable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice. . . . 344 U.S. at 195, 73 S.Ct. at 221.

To relegate teachers to a position of a second class citizen because they are teachers would be unconscionable and in direct conflict with the Constitution. Any law which would stifle fundamental personal remedies cannot be allowed to go unchallenged. *Pred, et al. v. Board of Public Instruction of Dade County, Florida, et al.*, 415 F.2d 851 (5th Cir. 1969) and *Montgomery v. White*, 320 F. Supp. 303 (E.D. Tex. 1969). If the Board of Education had denied Mr. Holmquist the right to speak out at a public meeting because of his position as a teacher, it would have, in effect, punished him and caused him to suffer retaliation because, as a teacher, he was exercising a fundamental First Amendment right.

Mr. Holmquist's right of freedom of speech, as a teacher, is more important than any dubious good that might be obtained through the negotiation of a

so-called "fair share" agreement. In *American Communications Association v. Douds*, 339 U.S. 382, 399, 70 S.Ct. 674, 684 (1950) this Court held:

> When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the court is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.

Mr. Holmquist's freedom of speech must be placed in the position above and must be considered to weigh more than any harm that might have been done by the discussion of the so-called "fair share" agreement.

B. First Amendment Rights Subject Only to Balancing Test

The Wisconsin Supreme Court in the decision below said that the prohibitions against freedom of speech in this case were within the limits imposed upon the restriction of those rights by this Court in its decisions. The Wisconsin Court quoted the balancing test adopted from the rule imposed by Judge Learned Hand below and imposed by this Court in its opinion in *Dennis v. United States*, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 94, 510, 71 S.Ct. 857 (1951). The rule as set forth was "[i]n each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbility, justified such invasion of free speech as is necessary to avoid the danger." 183 F.2d at 212.

Although the Wisconsin majority cited the *Dennis* test, it did not apply that standard. They did not face

the question of "improbability" of the "evil." The only "evil" that was discussed consisted of a speculative assertion of the possibility of "relative chaos." 69 Wis.2d at 211, 231 N.W.2d at 212. This analysis is simply constitutionally inadequate in the context of an admitted constitutional infringement. Given the test which the Wisconsin majority set forth in their opinion, there is a complete and total failure on their part to point out any "evil" that might have come about as a result of Mr. Holmquist's statement.

The question of labor strife, which would be a possible issue in the private sector, should not even be considered in the public sector. Strikes are not permissible under Wisconsin law, and therefore, industrial peace is not at issue. Furthermore, in both the case at bar and in *Board of School Directors of Milwaukee v. WERC*, 42 Wis.2d 637, 168 N.W.2d 92 (1968), the WERC did not find labor peace to be threatened by speech. Hence, it should follow, that there is no public interest that would justify any encroachment on the fundamental constitutional right of freedom of speech of Mr. Holmquist, or for that matter, any other teacher who appeared to make a statement before the Board of Education at a public meeting. The Wisconsin Supreme Court was not jusitifed in finding otherwise.

The reliance of the Wisconsin Court below on such cases as *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967) and *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 64 S.Ct. 830 (1944) is clearly misplaced. See 69 Wis.2d at 212, 231 N.W.2d at 213. Constitutional questions were not at issue in either one of these decisions nor in the precedents upon which this Court based its decision in these two cases. Furthermore, this Court has never ruled on whether the free speech of an

employee in either the private or public sector may be limited constitutionally on the basis of some formula for restraining and muffling expression, under the pretext of protecting the exclusive representative. Thus, the attempt of the Wisconsin Supreme Court majority to rest its decision on rulings of this Court is completely unfounded.

To permit a union to limit the subjects upon which a teacher-citizen can speak simply by putting the matter on the bargaining table, is directly contrary to this Court's decisions in both *Pickering, supra*, and *Police Department of Chicago v. Mosley, supra*.

IV.

MR. HOLMQUIST'S STATEMENT CANNOT BE CATEGORIZED AS "NEGOTIATING"

Contrary to the opinion of the Wisconsin Supreme Court, the statements by Mr. Holmquist in question cannot even be considered "negotiating". "Negotiate" is defined in *Webster's New International Dictionary* (3d ed.) as: ". . . 1: to communicate or confer with another so as to arrive at the settlement of some matter: to meet with another so as to arrive through discussion at some matter: to meet with another so as to arrive through discussion at some kind of agreement or compromise about something: come to terms, esp. in state matters by meetings and discussions . . ." Mr. Holmquist merely presented a petition to the Board of Education and explained what the petition said. He did not negotiate as that word is defined, nor did he even discuss the pros or cons of the so-called "fair-share"

issue. The Wisconsin Supreme Court seemed to infer that what Mr. Holmquist said had a substantial influence on the course of negotiations; but, to accept that contention would impute to the School Board a lack of firmness, wisdom, or honor, which would be an unjustified conclusion. Nowhere in the record is there justification for the contention that the presentation of the petition influenced the decision of the School Board, or, for that matter, that the argument of anyone influenced the Board's decision to the point where the Board insisted on the exclusion of the so-called "fair share" clause in the contract.

But if Mr. Holmquist's statement can be equated to "negotiating" as that word is defined, and if his statement can thus be found to be in violation of the Wisconsin statute in question, then that statute is too broad to survive constitutional scrutiny. The prohibition against "negotiation" must fall just as "the various other formulae for the repression of expression that have been challenged in the Court" on other occasions. *New York Times Co. v. Sullivan,* 376 U.S. 254, 269, 84 S.Ct. 710, 720 (1964). "Negotiation" must be measured by the same First Amendment standards as set forth previously by this Court; and any prohibition by the Wisconsin statute in question is not in such a position as to warrant immunity from constitutional limitations recognized by this Court because "the Constitution is concerned with the practical consequences, not the formal categorizations, of state law." *North Carolina v. Alford,* 400 U.S. 25, 37, 91 S.Ct. 160, 167 (1970).

However, the public meeting of the Board of Education was not a negotiation session. Instead, it was a meeting where citizens of the jurisdiction could meet and give a position statement. The exclusivity of the

bargaining representative in employer-employee relations cannot be permitted to reach or include the silencing of all voices except that of the designated representative. Public forum type discussions are truly in the American tradition, and town meetings such as the meeting of the Board of Education in question, must be left open to everyone and must not exclude any group of persons, such as teachers. Freedom of speech is fundamental to a free society and "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75, 85 S.Ct. 209, 216 (1964). The First and Fourteenth Amendments incorporate a total national commitment to open, uninhibited debate of public issues. If the School Board were open to charges of unfair labor practices every time a citizen presented a petition or discussed a matter of public interest, then the basis and foundation of the constitutional rights guaranteed to all citizens under these Amendments would be betrayed.

V.

CONCLUSION

For the reasons stated herein, the decision and judgment of the Wisconsin Supreme Court should be reversed. Justice and sound policy dictate that result. There is no justification for the thwarting of the basic

and fundamental constitutional rights of freedom of speech and freedom to present a grievance to a public body.

Respectfully submitted,

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IN THE

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Appellees.

ON APPEAL FROM THE SUPREME COURT
OF WISCONSIN

BRIEF AMICUS CURIAE ON BEHALF OF THE UNITED STATES CONFERENCE OF MAYORS, URGING REVERSAL

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IN THE

Supreme Court of the United States

October Term 1975

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, *et al.*,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF AMICUS CURIAE ON BEHALF OF THE UNITED STATES CONFERENCE OF MAYORS, URGING REVERSAL

Pursuant to Rule 42 of the Rules of this Court, and with the consent of all parties, witness whereof has been made to this Court, the United States Conference of Mayors files the annexed brief *amicus curiae*, urging that the decision of the Supreme Court of Wisconsin be reversed.

I.

THE DECISION IN THE CASE AT BAR COULD HAVE A SUBSTANTIAL IMPACT ON OUR NATION'S MAYORS. THE UNITED STATES CONFERENCE OF MAYORS IS THE ONLY ORGANIZATION WHICH CAN EFFECTIVELY REPRESENT THE COLLECTIVE INTERESTS OF THESE LOCAL OFFICIALS.

A. The United States Conference of Mayors has been the representative organization for the Mayors of our nation's largest cities since 1933.

The United States Conference of Mayors is an organization of city governments represented through their chief elected official, the Mayor. It was organized in 1933 to promote the causes of the city, to foster responsible and effective relationships between city halls and the federal government, and to insure that local governments be responsive to the needs of their citizens and versed in municipal administration. The Conference of Mayors is the national forum through which our larger cities express their concerns and work to meet the needs of urban America.

By limiting participation and membership to the 750 cities over 30,000 population, the Conference of Mayors can focus its efforts on major urban issues and has become a unique national spokesman.

The United States Conference of Mayors is a not-for-profit membership corporation organized under the laws of the State of Illinois, and section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3).

B. As the Chief Elected Official and as the Chief Executive Officer of local government, Mayors would be significantly affected in performing the duties of these often conflicting roles by an affirmance of the Wisconsin Supreme Court decision.

As the Chief Elected Official of a municipality, the Mayor is the embodiment of local government. *Tassin v. Local 832, National Union of Police*, 311 So. 2d 591 (La. App., 1975). In performing this role the Mayor is necessarily required to meet with members of the public on all matters concerning the affairs of government. For example, in the submission of a petition to local government, it is in most cases sufficient in law to deliver the petition to the Mayor. *Id.*, and see E. McQuillin, *Municipal Corporations* (3rd Ed) § 12.43 (1973) [hereinafter cited as McQuillin].

In addition to the usual ministerial and administrative tasks of the Mayor, as the Chief Elected Official, like other public officials, he is bound to respect and protect the constitutional rights of citizens. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Gregory v. Chicago*, 394 U.S. 111 (1969). The actions of a Mayor are deemed to be state actions thereby requiring that the exercise of the power of the office of the Mayor be without bias, guaranteeing equal protection of the law for all citizens. *Borreca v. Fasi*, 369 F. Supp. 906 (U.S.D.C., D.Ha.) (1974); *Shelley v. Kramer*, 334 U.S. 1 (1948); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

The Mayor is also the Chief Executive Officer of the community. While the powers of the Mayor vary in the many jurisdictions of the several states and within the

states, recent charters place great responsibility and power in the office of the Mayor. "This conforms to modern legislative policy relating to the administration of municipal concerns, whereby large authority is reposed in the Mayor who on this account may be held to a high degree of personal responsibility in the administration of the affairs of the city." *McQuillin*, § 12.43. The gradual increase of the powers of the Mayor has proceeded with the development of the concentration of municipal authority in as few officers as possible, to get efficient and quick action.

As the Chief Executive Officer of the city, the Mayor is vested by Charter with the power and authority to exercise all the executive powers of the municipality. These charters make the Mayor the responsible official in employment relationships between city employees and the city government. Under many of these charters the Mayor may also be the chief labor negotiator for the city government and is thereby charged with maintaining the integrity of the collective bargaining process. Finally, the Mayor may be responsible for the continuing operation of the city government including the delivery of municipal services during strikes by municipal employees.

Even a cursory examination of this governmental framework illustrates the potential for conflict between the Mayor, as the Chief Elected Official, a political role, and the Mayor, as the Chief Executive Officer, a proprietary role. The conflict arises because in each of the delineated roles a different standard of conduct is applied, and a different obligation exists. These standards and obligations are not necessarily mutually consistent.

Nowhere is the potential conflict more apparent than in the application of private sector labor law principles to public employment. At the same instant that the Mayor may be required to respect the constitutional rights of citizens, some of whom are public employees, he may also be required to comply with obligations imposed by statute to bargain only with the exclusive representative of public employees. If it could be assured that all public employees would support their union, no conflict would exist. But, public employees, just as any other citizens, disagree, and often, they disagree with the policies of their union. The dilemma for Mayors arises when the public employee wishes to express his dissenting view, both as citizen and employee.

The easy solution, of course, would be to hold that all discussions and presentations regarding matters subject to collective bargaining regardless of the forum fall within the scope of a "compelling state interest", and thus justify silencing of comment. However, the easy solution fails to recognize the importance of the concept of Mayor as the embodiment of local government. The Mayor is the focal point of the community – its image. As such, Mayors represent the community at large, must be available to perform ceremonial duties, and to hear citizens' grievances, as well as to implement administrative directives. The city is the unit of government closest to the citizen, and must be the first to respond to his needs. The Mayor's obligations to respect and support comment on matters of public importance is the primary corollary to his other responsibilities. Failure to carry out this responsibility would certainly cause dissension and can only serve to foment disruption. *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gregory v. Chicago*, 394 U.S. 111 (1969).

In this case, the United States Conference of Mayors seeks to represent the interests of its membership, the nation's Mayors, by clarifying the responsibilities of Mayors and other public officials given the conflicting duties outlined above. In addition, it wishes to impress upon the Court the imprudence of a decision affirming the Wisconsin Supreme Court. In the analysis of the various standards to be applied, the Conference of Mayors will seek to expose the implications of imposing private sector labor relations principles on public employment without consideration of the serious constitutional consequences for Mayors.

II.

PRIVATE SECTOR LABOR LAW CONCEPTS OF EXCLUSIVITY CANNOT BE PROPERLY INTERPRETED TO PROHIBIT COMMENT FROM INDIVIDUAL TEACHERS AND MINORITY UNIONS DURING PUBLIC SCHOOL BOARD MEETINGS.

A. The history of the "Exclusivity" principle in the private sector relies upon the need for peace in the collective bargaining process and the need to protect the right to organize collectively.

In its barest terms, the concept of exclusive recognition means that the union designated by a majority of the relevant employees negotiates collective bargaining contracts on behalf of all employees. In addition to the right granted by exclusive recognition, there is imposed upon the employer a corelative duty

not to negotiate on any matters subject to collective bargaining with any other organization, minority union or individual employee. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); But see George Schatzki, "Majority Rule, Exclusive Representation, and the Interests of Individual Workers": Should Exclusivity Be Abolished?" 123 U. Pa. L. Rev. 897-938, Apr. 1975.

The principle of exclusivity became a popular notion during the years between enactment of the National Industrial Recovery Act of 1933 (48 Stat. 213) and adoption of the National Labor Relations Act of 1935, 49 Stat. 449 as amended, 29 U.S.C. §§141 *et seq.* when it became increasingly apparent that employers were exploiting employee fragmentation to their benefit in the collective bargaining process. To alleviate this problem, and to insure some relative strength for employee organizations, exclusive recognition was incorporated into Section 9(a) of the National Labor Relations Act. This addition was also necessary in order to resolve disagreements which arose under Section 7(a) of the National Industrial Recovery Act respecting the manner in which the political representation of employees would be achieved. Section 7(a) itself guaranteed collective bargaining without specifying how representatives would be chosen or whom they should represent. This ambiguity led to disputes not only between employers and unions, but also between various governmental officials as to whether section 7(a) intended plural, proportional, or majority representation.[1] As Francis Biddle, then

[1] Generally, there are three ways in which union representation may be described: plural, proportional or exclusive. Plural recognition means that the organization is the negotiating agent for *its members only*. Proportionate representation, on the other hand, involves the creation of a negotiating council as the representative with each of the organizations having membership on the council *proportionate* to the percentage of the employees who support that organization.

Chairman of the old National Labor Board under Public Resolution No. 44 testified in hearings preceding enactment of the National Labor Relations Act:

> The experience of this Board in the cases before it has indicated that the insistence of the employer on individual bargaining has been for the purpose of interfering with collective bargaining and not for the purpose of preserving the individual liberty of contract of the American workman. *Hearings before Committee on Education and Labor on S. 1958,* 74th Cong., 1st Sess. (1935) Pt. 2, p. 151.

The application of exclusive recognition in the private sector afforded employees through their exclusive agent the opportunity to present a united front to employers during the bargaining process. In addition, a union cloaked in the mantel of exclusivity carried with it the authority and power to leverage negotiations. The exclusivity principle diminished the employer's ability to play various organizations or individual employees off against one another, thus enhancing the relative strength of employee unions.

In the private sector, therefore, the concept of exclusivity was proven successful in minimizing organizational disputes, maximizing the efficiency of the collective bargaining process, and solidifying the position of labor unions *vis a vis* management.

B. Blind application of private sector concepts of exclusivity to public sector labor relations, without adequate consideration of the different obligations imposed in each, is improper, and may result in the imposition of significant burdens on the exercise of First Amendment rights by public employees.

A conclusion drawn by the Rockefeller Committee on Public Employee Relations (The Taylor Committee) in March, 1966 reflects the enthusiastic, but ill-considered, application of private sector labor law principles to the public sector without adequate review of the constitutional implications of such a transplant:

> We find a number of advantages in the use of the principle of recognizing a majority organization as exclusive representative for all employees in the unit. There are advantages in the elimination of the possibility that the executives of an agency will play one group of employees or one employee organization off against another. There are advantages in the elimination, for a period, of inter-organizational rivalries. There are advantages in discouraging the 'splitting off' of functional groups in the employee organization in order to go it on their own. There are advantages in simplifying and systematizing the administration of employee and personnel relations. These are advantages in an organization's ability to serve all the employees in the unit. *Final Report* 29 (March 31, 1966).

Certainly, no one can contest that when considered from the perspective of labor peace, efficient collective bargaining, and union status, exclusive recognition makes as much sense in the public sector as it does in the private sector. But from the perspective of individual rights and protected constitutional conduct, exclusivity in public employment can be resisted as undemocratic. Supporters of the principle will undoubtedly argue that in the political arena, the Senator, Congressperson or other official selected by the majority represents all members of the particular voting district. However, this analogy cannot be drawn too far, for similarly in the political sphere, minority groups and individuals retain certain rights – to petition, to

protest, to assemble peaceably, to criticize, and to campaign for a replacement. To the extent that the exclusive recognition is adopted in public employment, there is a commensurate diminution in the freedom of individual employees in a governmental unit. Because, upon adoption of an exclusive recognition policy, the state will be acting not only in its traditional regulatory role, but also in the role of employer, a zone of protection for the organizational, representational, and individual rights of members of a minority organization should be scrupulously formulated. "The alternative could be the unnecessary, unjust and perhaps unconstitutional subversion of individual employee and minority union rights in public employment." "The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment," 55 *Cornell L. Rev.* 1004, 1005-1006 (1970).

Because of the dual role the state plays in public sector labor relations – that of regulator and employer, the wholesale application of the exclusivity principle may not be applicable or proper. As regulator, that is the constitutionally constructed authority to serve the needs and will of the people, the state is obligated to preserve and equally protect the constitutional rights of its citizens, including public employees, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1968), and, does "not constitutionally have the complete freedom of action enjoyed by a private employer." *Cafeteria & Restaurant Workers, Local 473 v. McElroy*, 367 U.S. 886, 897-98 (1961). Employers in the private sector have no corresponding duty, and may, therefore, place the goal of successful labor negotiations above all others, including restraints on individual conduct. The

affirmative obligation to protect the individual's right to speak, assemble and petition is not imposed upon private employers.

As employer, on the other hand, the state is obligated by statute to participate in the collective bargaining process as management for the state administrative and political framework, and to extract the most efficient and financially sound agreement.

These obligations are not always mutually consistent, as the case at bar demonstrates, and the public official is placed in the unenviable position of reconciling responsibilities under constitutional and labor law. Thus, unlike the private sector, where the primary motivation and rationale for labor law principles is successful collective bargaining, application of the exclusive recognition concept in the public sector requires a balancing of substantial constitutional interests and duties against compelling state interests in achieving efficient and peaceful labor relations.

C. The facts of the present case accurately illustrate the problems of balancing these rights and obligations at the interface of constitutional and labor relations principles.

1. While the state has a legitimate interest in stable labor relations in the public sector, the "clear and present danger" cases are not the appropriate cases for defining the extent to which that state interest may be invoked to infringe on constitutional rights.

In the case at bar, the Madison School Board was found guilty of committing an unfair labor practice when it allowed a non-union teacher to speak at an open, public meeting of the Board. The teacher also

sought to present a petition to the Board. The Wisconsin courts reached this conclusion by finding that the presentation by the teacher constituted "negotiating" with persons other than the representative of the exclusive bargaining unit.

It is undisputed that public employees, including teachers, retain their First Amendment rights. *Pickering*, 391 U.S. at 568; *Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

> At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering v. Board of Education*, 391 U.S. at 568.

It is necessary to examine whether the Wisconsin Supreme Court properly balanced the interests of the teacher in commenting upon matters of public concern, and the interests of the state in stable public employee labor relations, particularly where it is clearly established that the burden lies on the state to justify regulation of substantial freedoms, such as those protected by the First Amendment.

The Wisconsin Court reached this decision by use of an expansive definition of "negotiating", a definition which could reach all public comment on any matters subject to collective bargaining by any member of the bargaining unit.

The constitutional rights at issue in this litigation are those of Free Speech, the Right of Petition, the Right of Association and the Right to Equal Protection of the Law.

The Court's imposition on free speech and petition was premised on the content of that speech, matters subject to collective bargaining. It has long been established that restrictions premised on content are precisely what the First Amendment forbids. *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). The rule, as promulgated by the Wisconsin courts, has the effect of silencing differing perspectives on issues of public importance. This goal, the encouragement of comment on public issues, was the basis of this Court's decision in *Pickering*.

There is no doubt that the state has a legitimate interest in regulating speech, and speech related activities. Again, the question arises whether the state's interest can reach so far as to reach the result in the case at bar. Regardless of the proffered state interest, action which is aimed directly or which results in a restraint on protected freedoms or conduct bound to those freedoms must be stricken as unconstitutional *per se*, and should never be justified by a balancing approach. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Shelton v. Tucker*, 364 U.S. 479 (1960).

The Wisconsin Court's use of constitutional "clear and present danger" cases is wholly inappropriate to the facts of this case. Legitimate comment on public issues is not shouting "fire" in a crowded theater, (*Schenck v. U.S.*, 249 U.S. 47 (1919)), nor do the facts of this case indicate that Holmquist used "fighting words." *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The

cases cited by the Court are themselves instructive of the inadequacy of the imposition of this rule on this activity. In *Schenck v. U.S.*, 249 U.S. 47 (1919), this Court considered the use of restriction on free speech in connection with espionage and conspiracy in wartime. In *Dennis v. United States*, 341 U.S. 494 (1951), this Court considered restrictions on advocacy in a national security setting. Finally, this Court refused to uphold a state requirement that students salute the flag in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). The facts of the case at bar relate to grave interests of the state, but those interests are not as grave as national security and espionage. The "clear and present danger" cases cited by the Wisconsin Court simply do not establish a principle for limiting First Amendment rights in this case.

This Court has, in a variety of cases, established other principles, more applicable to the case at bar, relating to governmental infringement on First Amendment rights in light of an existing, legitimate state interest. *Tinker v. DesMoines School District*, 393 U.S. 503 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968), *Adderly v. Florida*, 385 U.S. 39 (1966); *Pickering v. Board of Education*, 391 U.S. 563 (1968). In the cited cases, and others, this Court has looked variously at a "balancing" test, an "overbreadth" test, and a "least drastic means" test. These cases are also important for they discuss the role of governmental infringement of free speech in settings where the regulation has some valid purpose completely independent of the regulation of speech. Most importantly, these cases discuss the regulation in relation to a presumption that the regulation should not reach First

Amendment rights except to the extent absolutely necessary to fulfill the legitimate state purpose.

On the facts of this case, the regulatory interest, while sufficient in theory, must still fall "because the communication . . . integral to the conduct is itself thought to be harmful." *United States v. O'Brien*, 391 U.S. at 382. Such a bootstrapping theory cannot be heard to justify infringement on important constitutional protections.

2. The significance of the public forum and the need for vigorous comment on issues of public importance require that the solution to the case at bar include the most extensive protections available for First Amendment rights.

This case arose from occurences at an open, public school board meeting. If nothing else, such a meeting constitutes a "public forum." This Court, on numerous occasions, has faced issues relating to public fora. In a number of those cases, this Court was called upon to decide whether a given setting was a "public forum," where constitutional protections are fully available to those wishing to engage in public expression. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968). The present case presents no such problem.

The notion that individuals have an absolute right to use some public area for speech and assembly, the "public forum right," has been delineated by this Court in several cases beginning with *Hague v. CIO*, 307 U.S. 496 (1939). See also, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); Comment, "Public School as Public Forum," 54 *Tex. L. Rev.* 90 (1975);

Stone, "Fora Americana: Speech in Public Places," 1974 *Sup. Ct. Rev.* 233.

This Court has found that reasonable regulation of the "time, place and manner" of the exercise of free speech rights is permissible so long as the regulation is not designed to, or has the effect of, discriminating on the content of any given speech or on the identity of the speaker. *Cox v. New Hampshire,* 312 U.S. 569 (1941); *Cox v. Louisiana,* 379 U.S. 559 (1965). As the School Board meeting was a public meeting, and Holmquist spoke during the time reserved for public comment on matters of public interest, it appears that no restrictions regarding "time, place and manner" of speech would be appropriate if applied to the facts of this case. In fact, a public meeting of a public body, convened to discuss issues of public importance represents the quintessential public forum. It is difficult to think of any other gathering where protections for the right to speak and petition are more appropriate or more consistent with the doctrine of the public forum.

Similarly, this Court has affirmed the need for uninhibited, robust and wide open debate on issues of public importance and recognized the significance of the "citizen-critic," in democratic government. *New York Times v. Sullivan,* 376 U.S. 254 (1964); and see *Pickering v. Board of Education,* 391 U.S. 563 (1968), where these principles were discussed in relation to public employment; Shaw and Clark, "The Practical Differences Between Public and Private Sector Collective Bargaining," 19 *UCLA L. Rev.* 867 at 999 (1972). The "citizen-critic," whether a private citizen or a public employee, holds an esteemed position in our governmental structure. "It is as much his duty to criticize as it is the officials duty to administer." *New*

York Times v. Sullivan, at 282. Certainly Holmquist was discussing issues of public importance, issues on which debate should be wide open. His appearance at the meeting was not even in the role of a critic, but, rather, as a conciliator, seeking deferral of the fair share proposal pending an impartial, public study of the issue. This is precisely the type of activity this Court has sought to protect, and is in the best First Amendment tradition.

As the primary purpose of the public meeting was to discuss matters of public importance, it is difficult to say that Holmquist's speech was disruptive of the primary purpose of the meeting. The mere fact that Holmquist's speech touched on labor relations is not, of itself, sufficient to restrict his right to speak absent a showing of disruption of the primary purpose of the meeting. Compare *Police Department of the City of Chicago v. Mosley,* 408 U.S. 92 (1972), with *Grayned v. City of Rockford,* 408 U.S. 104 (1972); and see *Tinker v. DesMoines School District,* 393 U.S. 503 (1969).

To the extent that there was disruption of the activities of the meeting, that disruption is wholly attributable to the activities of the exclusive bargaining agent, Madison Teachers, Inc. The Supreme Court determined that this meeting, an open, public meeting of the Madison School Board, became a "part of the negotiation process," thus, the Court reasoned, the statement by Holmquist constituted "negotiating," in violation of the exclusivity principles of the Wisconsin Statutes. *City of Madison, Joint School District No. 8, et al., v. WERC, et al.,* 69 Wis.2d 200, at 213, 231 N.W.2d 206, at 213 (1975).

In reaching the determination that the meeting was a "part of the negotiation process," the Court cited four facts: 1) that an impasse had been reached; 2) that the majority union had several members present; 3) that the majority union had pickets present; and 4) that representatives of the majority union addressed the board on subjects of the collective bargaining negotiations. 69 Wis.2d at 213, 231 N.W.2d at 213. Each of these conditions, with the possible exception of the impasse, was completely within the control of the majority union, the exclusive bargaining agent.

It is incongruous that the majority union, which alone had the right and the power to meet behind closed doors and negotiate with the Board on all matters subject to collective bargaining, could convert an otherwise open, public meeting into a "negotiation session," thereby, under the ruling of the Wisconsin Supreme Court, depriving non-union members of constitutional rights as well as possibly putting the Board in the position of violating the State's "sunshine," open meeting law. In similar situations, this Court has held that, to the extent possible, it is the duty of government to restrain the disruptors in protecting the free speech rights of citizens. *Gregory v. Chicago*, 394 U.S. 111 (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

The principles relating to the public forum and the need for wide open debate on public issues require reversal of the decision of the Wisconsin Supreme Court in this case.

3. As an agent of the State, the Madison School Board is obligated to treat all citizens, who participate in a public meeting, regardless of their employment status or their union status, equally. The decision of the Wisconsin Supreme Court in this case would require school boards to violate this responsibility.

As school boards are creatures of the State, and board members are public officers, the equal protection mandate of the Fourteenth Amendment is fully applicable to their activities. *Ex parte Virginia*, 100 U.S. 339 (1880).

While public officials may have the discretion to discriminate in the performance of certain functions, they must first demonstrate a rational and necessary relationship between the discrimination and a compelling state interest. Particularly, where fundamental constitutional rights are at issue, this Court is obligated to exercise "strict scrutiny," holding the State to a standard of "high need." *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

In the case at bar, no "high degree of need" exists, and the standard which the Wisconsin Supreme Court decision would impose exceeds permissible discriminatory conduct. Affirmance of that decision would have the effect of ignoring the differences between the exclusive bargaining role of the recognized union and the role of that union as a rival to a minority competitor. It would subject minority unions and individual employees to the unequal treatment proscribed by the Fourteenth Amendment. The concept of exclusivity and the benefits derived from such recognition must be reasonably related to the attainment of permissible objectives. *Railway Employes'*

Department v. Hanson, 351 U.S. 225, 233, 235 (1956); c.f. *Virginian Railway v. System Federation No. 40*, 300 U.S. 515, 558-59 (1937). The deprivation of constitutionally protected speech and petition – rights fundamental to the operation of our political process – is not a permissible objective. The Wisconsin Supreme Court itself recently noted this distinction:

> Those rights or benefits which are granted exclusively to the majority representative, and thus denied to minority organizations, must in some rational manner be related to the functions of the majority organization in its representative capacity, and must not be granted to entrench such organization as the bargaining representative.
>
> *Board of School Directors v. Wisconsin Employment Relations Commission*, 42 Wis. 2d 637, 649, 168 N.W.2d 92, 97 (1969).

In the same matter, the Court noted that while the exclusive use of school bulletin boards and teacher mailboxes was not on appeal before it, the Wisconsin Employment Relations Commission had determined and the circuit court had affirmed that, insofar as the use of the physical facilities of the school was related to normal union activities, the privileges had to be extended to the minority union if granted to the majority. *Board of School Directors*, 42 Wis. 2d at 642 n. 3, 168 N.W. 2d at 94 n. 3. See also *Avondale School District Board of Education*, 1968 Mich. L.M.B. Ops. 518, 525. It is difficult to draw a distinction between the disparate treatment prohibited in the cases cited above, and the effect the Wisconsin Supreme Court decision would have in public meetings where matters of collective bargaining are on the agenda. The effect is to permit the exclusive representative to speak at open public meetings, and to exclude comment from

employees in the bargaining unit if it does not conform to the policies espoused by the majority union. This is nothing less than arbitrarily denying individual teachers who choose to dissent from the union position the conveniences, advantages and fora in exercising speech and association rights. The fact that the Wisconsin statute itself did not authorize such discrimination is irrelevant, if, in its implementation it is applied so. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Ex parte Virginia*, 100 U.S. 339 (1880); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *United States v. Classic*, 313 U.S. 299 (1941).

In the instant matter, the distinction drawn is not justified by a compelling state interest.

III.

BOTH IN TERMS OF VIOLATING FIRST AMENDMENT RIGHTS OF FREE SPEECH, PETITION AND ASSOCIATION, AND IN TERMS OF THE PRACTICAL APPLICATION OF LABOR LAW PRINCIPLES TO THE PUBLIC SECTOR, THE DECISION OF THE WISCONSIN SUPREME COURT MUST BE REVERSED.

As the discussions thus far have indicated, the rights of a minority union and individual employees should initially be measured against the First Amendment rights to speak freely, to assemble peaceably, to petition, and to associate, guaranteed against infringement by either the federal or state governments. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). In *Thomas v. Collins*, 323 U.S. 516 (1945), the Court held that the

"grievances for redress of which the right of petition was insured" are not confined to religious or political causes, but include other fields of human interest including business or economic activity. It has also been demonstrated that the freedom of individual employees organized into a minority union to speak out on subjects concerning the employment relationship is constitutionally protected. *Pickering v. Board of Education*, 391 U.S. 568 (1968).

The conclusion we draw in this matter on the basis of these arguments is that the Wisconsin Employment Relations Commission and Wisconsin court's interpretation of the facts in this case infringes upon an individual public employee in the exercise of First Amendment rights beyond permissible constitutional limits, regardless of the test applied; and further, this infringement is not required by a reasonable application of labor law principles. The legitimate and compelling state interest served by the exclusivity provision of the Wisconsin Statutes is outweighed by the manner and degree that First Amendment rights are infringed.

Resolution of the case at bar may be assisted by a scrupulous assessment of Wisconsin case law preceding this litigation. The dispositive issue in those cases as in the case before the Court is what constitutes and limits collective bargaining for the purpose of reaching an agreement between an employer and the recognized exclusive representative.

The scope of the exclusivity provision of the Wisconsin Statutes, Sec. 111.70 was also at issue in *Milwaukee Teachers Union*, Dec. No. 6995-A at 12-13 (WERB, March 24, 1966)., *rev'd in part sub nom Board of School Directors v. W.E.R.C.*, 42 Wis. 2d 637, 168 N.W. 2d 92 (1969). Milwaukee Teachers Educational

Association [hereinafter MTEA] was designated exclusive collective bargaining agent by the Wisconsin Employment Relations Board [hereinafter WERB]. After the Board of School Directors for Milwaukee had entered into contract negotiations with MTEA, a teacher, *acting as a representative* of the minority, Milwaukee Teachers Union [hereinafter MTU], was denied an opportunity to speak on negotiable matters at a public meeting of a committee of the school board. Because representatives of groups other than the MTU had been permitted to speak on such matters at that meeting, MTU filed a complaint against the school directors with WERB. The Board determined that the denial of the right to speak was unlawful and ordered the school directors to cease and desist from depriving any member or representative of an employee organization of the opportunity to be heard "at any public meeting held for any purpose." *Milwaukee Teachers Union*, Dec. No. 6995-A at 8. In support of its decision, the Board adopted the rationale that a public hearing is not a forum for collective bargaining in public employment. *Milwaukee Teachers Union*, Dec. No. 6995-A at 17. The Board concluded that an appearance by a minority union at a public hearing could not be equated with an attempt at collective bargaining even though the hearing agenda involved negotiable subjects. The concept of collective bargaining in public employment, as elsewhere, must be restricted to a give and take relationship between the public employer and the exclusive representative "across the 'bargaining table'." *Milwaukee Teachers Union*, Dec. No. 6995-A at 17.

The decision of the WERB was reversed on appeal by a circuit court (*Board of School Directors v. WERC*, 42

Wis.2d 637, 643-44, 651, 168 N.W.2d 92, 95, 98-99 (1969), and the Wisconsin Supreme Court affirmed the reversal, 42 Wis.2d at 654, 168 N.W.2d at 100 (1969)). In its opinion, the Supreme Court concluded that the public employer engages in prohibited collective bargaining whenever it permits a representative of a minority union to speak on negotiable subjects during a private or public *negotiating* session, (emphasis supplied). *Board of School Directors v. WERC*, 42 Wis.2d at 651-54, 168 N.W.2d at 99-100. Contrary to the decision of the WERB, the Court held that the collective bargaining process included the open hearing required by the anti-secrecy law, at which the governmental body *acts* on an agreement negotiated between its agent and the exclusive representative. The Court's rationale was that permitting a minority union to express its views on negotiable subjects during what amounts to a negotiating session would defeat the purpose of designating the majority union as exclusive bargaining representative.

We would argue, however, that the Court went too far in imposing the exclusivity principle on an area of free speech and petition protected by First Amendment guarantees. An appearance at a mandatory public meeting is hardly the negotiation of wages and conditions of employment, see Section II. C. 2. above. Particularly, in the case at bar, the negotiation of the agreement was continuing to take place in private sessions without the interference of any minority unions or individual employees. It would be purposeless for a minority union, individual employee or interested citizen to address a public body without the intent to influence its thinking, but the public employer is under no obligation to reply to or treat with that interested party.

The privileges afforded a minority union or individual teacher under these circumstances is no stronger than that expressed in the basic right "to assemble, and to petition the Government" guaranteed by the First Amendment of the Federal Constitution and article I, section 4 of the Wisconsin Constitution.

To deny only a minority union or non-union teacher the right to appear and to speak before a public meeting of the governmental body as the Wisconsin Superme Court did in the Milwaukee Teachers case, and as it would do in the instant matter precludes public comment by an organization or individual with a real and immediate stake in the outcome of the deliberations. Furthermore, it defeats the policy of anti-secrecy laws – of public access "to the fullest and most complete information regarding the affairs of government" during public meetings "open to all citizens at all times." Wis. Stat. Ann., Sec. 14.90(1) and (2) (Supp. 1969).

It is doubtful that the exclusivity concept was intended to protect majority unions from public comment of the nature described in this case. It is also speculative to think that the collective bargaining process will be undermined by permitting speech or petition as undertaken in this matter. Moreover, denial of the right to speak and petition violated not only First Amendment guarantees absent a compelling state interest, but also may violate under the facts of this case statutory provisions protecting the public employee's equal right and access to channels of communication made available freely to the majority union or other organizations. *Healy v. James*, 408 U.S. 169 (1972); *Michigan City Federation of Teachers, Local 399 v. Michigan City Area Schools*, Civ. No. 72594 (N.D. Ind.), Jan. 24, 1973. See Section II.C.3. *supra*.

In addition to the pure constitutional arguments, common sense and practical definitions of "negotiation" weigh heavily against its application to the exchange taking place in this case. As contained in Wollett and Chanin, *The Law and Practice of Teacher Negotiations*, The Bureau of National Affairs, Washington, D.C. at p. 1:5:

> The process [of negotiation] is one of proposal and counterproposal, of action and reaction, of give and take – resulting finally in a 'deal' or 'no deal', in mutual agreement or stalemate . . . Bilateral determination of the terms and conditions of employment through the process of negotiations means that neither party has the ability to impose its will on the other and that each is able, in law and in fact, to veto the proposals of the other.

A letter from the Attorney General of Massachusetts to the Commissioner of Education supports this narrow interpretation of "negotiation":

> A collective bargaining session . . . is a meeting at which the employer and employees are engaged in a process of an interchange and analysis of each other's proposals and counterproposals. Att'y Gen. of Mass. – Letter to Com'r of Education, Owen Kiernan, Sep. 12, 1967.

This case presents the precise circumstances in which the Supreme Court of Wisconsin drew the following conclusion:

> If this case involved solely the giving of a position statement at an ordinary meeting of a public body, we would have some difficulty in labelling the conduct 'negotiating.' *Board of School Directors v. WERC*, 42 Wis. 2d at 651, 168 N.W. 2d at 99.

The case at bar was a regular public meeting at which the only exchange between members of the school

board and the minority teacher was the presentation by the teacher of the position statement. As such, anyone would "have some difficulty in labelling the conduct 'negotiating'." The fact that the majority union had pickets present outside the meeting hall, and that one of its spokesmen was permitted to address the school board does not operate to convert a scheduled public meeting mandated under state anti-secrecy laws into a collective bargaining session. If anything, the conduct of the majority union in monopolizing the atmosphere and platform of such a session should militate in favor of permitting speech from varying perspectives.

Constitutional and practical dictates favor a reversal of the Wisconsin Supreme Court decision.

CONCLUSION

For the reasons stated above, the decision of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-946

CITY OF MADISON,
JOINT SCHOOL DISTRICT No. 8,
CITY OF MADISON,
VILLAGES OF MAPLE BLUFF AND
SHOREWOOD HILLS, TOWNS OF MADISON,
BLOOMING GROVE, FITCHBURG AND BURKE
AND ITS AGENT THE BOARD OF EDUCATION,
CITY OF MADISON JOINT SCHOOL DISTRICT No. 8,
Appellants

v.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION and
MADISON TEACHERS INCORPORATED,
Appellees

BRIEF OF WISCONSIN ASSOCIATION OF SCHOOL BOARDS, INC., AS AMICUS CURIAE

On appeal from the Wisconsin Supreme Court decision entered
on June 30, 1975 (69 Wis. 2d 200, 231 N.W. 2d 206)

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Appellants

v.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION and
MADISON TEACHERS INCORPORATED,
Appellees

BRIEF OF WISCONSIN ASSOCIATION OF SCHOOL BOARDS, INC., AS AMICUS CURIAE

On appeal from the Wisconsin Supreme Court decision entered
on June 30, 1975 (69 Wis. 2d 200, 231 N.W. 2d 206)

This brief *amicus* in support of Appellants is filed by the Wisconsin Association of School Boards, Inc., with the written and filed consent of the parties as provided in Rule 42.2 of the Rules of this Court.

INTEREST OF WISCONSIN ASSOCIATION OF SCHOOL BOARDS, INC.

The Wisconsin Association of School Boards, Inc. (WASB) is a voluntary non-stock membership corporation, authorized and organized under Chapter 181 of the Wisconsin Statutes. Of the 436 public school boards in the State of Wisconsin, some 430 boards belong to the WASB. The stated purposes of the WASB as set forth in its Articles of Incorporation and Bylaws, are to aid and assist public school boards and public school agencies of the State of Wisconsin in performing their lawful function, primarily through meetings, communications and dissemination of information, and to promote, support and advance the interest of public education in Wisconsin.

The decision of the Wisconsin Supreme Court challenged here is that an individual school district employee can, consistent with the First Amendment to the U.S. Constitution, be precluded from appearing and speaking at a public meeting of the board of education of that school district, during a portion of that meeting set aside for public appearances, on those matters which are subject to collective bargaining between the board of education and an organization representing employees for purposes of collective bargaining. WASB sees in that decision not only an unjustified infringement of the fundamental rights of public employees guaranteed by the First Amendment to the U.S. Constitution, but a serious threat to thorough and efficient governmental operation of public school districts, since it unnecessarily restricts the access of that body, charged with important policy making functions in the operation and management of public schools, to sources of information essential to its function.

WASB recognizes the exclusive right of the collective bargaining representative to negotiate with a public employer on wages, hours, and conditions of employment under s. 111.70, Wis. Stats., and concurs in appellant's concession that speech or petitioning in the form of bargaining or negotiating for a labor agreement can constitutionally be restricted to the exclusive representative of the bargaining unit. However, WASB believes that it is not necessary in order to preserve the exclusive status of the collective bargaining representative that public school employees be wholly precluded from speaking to their governmental employer on any matters of concern to them or to the operation of the schools if such concerns pertain to any matter subject to collective bargaining, or that public school employer be precluded from listening to these concerns. Public employees should not, and constitutionally cannot, be denied the opportunity to speak and present a petition to a duly elected board of education on a matter subject to collective bargaining at a regular school board meeting during the portion of that meeting devoted to public appearances. Public school boards must, within the limits of their proscribed procedures, be allowed to hear in public meetings comments, suggestions or reports from all persons, including its employees, even on these matters which relate to wages, hours and conditions of employment.

SUMMARY OF ARGUMENT

Under s. 111.70, as interpreted by the Wisconsin Supreme Court, a school board cannot permit a municipal employee to appear before and address the board at a public meeting, during a portion thereof devoted to public

appearances, on a matter subject to collective bargaining, because listening to an employee speak on such subjects constitutes negotiating and, therefore, interferes with the right of municipal employees to bargain collectively through representatives of their own choosing and violates the duty of the board, as employer, to bargain with the exclusive representative of employees in a bargaining unit. The statute as interpreted infringes upon the First Amendment rights of thousands of public employees in the State of Wisconsin because it prohibits them from petitioning their government on matters of concern to them as employees and individual citizens, and, because it prohibits speech directed to government, has the harmful effect of depriving governmental bodies of access to information on matters having a substantial impact on government services.

First Amendment rights are not absolute and speech can be circumscribed when used as an integral part of conduct which violates a valid state statute. However, states cannot foreclose the exercise of constitutional rights by mere labels. While speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to the exclusive representative of a bargaining unit, a state cannot, consistent with the First and Fourteenth Amendments to the U.S. Constitution, prohibit a governmental body from merely receiving a petition or listening to its employee speak on a matter subject to collective bargaining, at a public meeting, by labeling such activity "negotiating." Merely listening by a public governmental body to an employee's petition on a matter which may be subject to bargaining is not in derogation of the rights of public employees to bargain collectively

through representatives of their own choosing, and causes no significant threat of harm to the exclusive right of the bargaining representative or to the state's valid interest in labor relations.

Public employees have a substantial interest in addressing their employer on matters subject to bargaining. This is particularly true in those instances where the employee's individual goal and the union's institutional goals are at odds, where the subject is one having a fundamental personal bearing on the employee as an individual, and where the subject has ramifications with respect to the extent and quality of services performed by the government of employment.

Decisions on wages, hours and conditions of employment have a profound effect on the operation of the public schools, and unnecessary restrictions on the school boards' access to information on such subjects can substantially impair effective governmental decision making. Regardless of the merits of this particular case, the order of the WERC, which absolutely prohibits a school board from permitting any employee, who is not the collective bargaining representative, to speak at a public meeting of the board on matters subject to collective bargaining, precludes the board from receiving information concerning the performance of its governmental function from sources most appropriately positioned to give it.

ARGUMENT

I.

Section 111.70 Wis. Stats., As Interpreted By The Decision In The Wisconsin Supreme Court Effectively Denies Municipal Employees In The State Of Wisconsin The Right Of Addressing Their Government On Subjects Which May Have A Direct Bearing On Them As Well As A Direct Impact On The Services Performed By Government

Section 111.70, the Municipal Employment Relations Act (MERA), secures to municipal employees in the State of Wisconsin the right of self-organization, including the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful concerted activities for the purpose of collective bargaining, or other mutual aid or protection. Such employees also have the right to refrain from any and all such activities except the requirement of paying dues in the manner provided in a fair-share agreement. s. 111.70 (2), Wis. Stats. MERA makes it a prohibited practice for a municipal employer in Wisconsin to interfere with, restrain or coerce municipal employees in the exercise of these rights (s. 111.70 (3) (a) 1., Wis. Stats.), or to refuse to bargain collectively with the representative of the majority of employees in an appropriate bargaining unit (s. 111.70 (3) (a) 4., Wis. Stats.). The Wisconsin Employment Relations Commission (WERC) is charged

with duty of preventing prohibited practices, including the duty of entering a remedial order when a prohibited practice is found to have occurred. ss. 111.70 (4) (a), 111.07 (4).

While engaged in negotiating for a collective bargaining agreement with the Madison Teachers Incorporated (hereinafter MTI), the exclusive bargaining representative for the Madison school district teachers, the Madison Board of Education (hereinafter board) permitted a teacher employed by the district to appear before, and address and present a written petition to the board opposing inclusion of a "fair-share", i.e., mandatory union dues deduction, agreement (s. 111.70 (1) (h), Wis. Stats.) in the collective bargaining agreement then being negotiated. This occurred at a regular public meeting of the board, at a portion of that meeting devoted to public appearances. The board listened as the employee addressed the board and read the contents of a petition. However, no exchange took place between the employee and any member of the board other than a question following the employee's presentation whether he intended to communicate the written petition to the board, and the reply by the employee that he did.

A complaint was thereafter filed by MTI with the WERC alleging that by listening to one of its employees speak at a public meeting on a matter subject to negotiations, the board had negotiated with other than the exclusive collective bargaining representative and thereby violated MERA. Following a hearing, the WERC held that the board, in allowing the employee to speak and in listening to his statement and an oral presentation of his petition, had committed a prohibited labor practice by

violating its duty to bargain in good faith with the exclusive bargaining representative and by interfering with the rights of employees represented by MTI to bargain collectively through a representative of their own choosing. The WERC ordered that the board "immediately cease and desist from permitting employees, other than representatives of Madison Teachers, Inc. to appear and speak at meetings of the Board of Education on matters subject to collective bargaining between it and Madison Teachers, Inc." The WERC decision and order were affirmed by judgment of the circuit court, and the Wisconsin Supreme Court affirmed the judgment of the circuit court.

The Wisconsin Supreme Court held that under MERA the organization chosen for purposes of collective bargaining in a particular bargaining unit is not only the bargaining representative for members of that organization, but is the exclusive bargaining representative for all employees of the bargaining unit whether or not they are members of that organization. *Madison Joint School Dist. No. 8 v. WERC*, 69 Wis. 2d 200, 200, 231 N.W. 2d 206. The court held that speech in the form of bargaining or negotiating can constitutionally be restricted to the representative of the majority organization because it is "justified by the necessity to avoid the dangers attendant upon relative chaos in labor management relation." (*Madison*, supra, at 212); and further, that permitting an employee to speak at a public meeting of the board on a matter subject to collective bargaining constitutes bargaining and can, therefore, likewise be restricted to the representative of the majority organization without infringement of First Amendment

rights. The Supreme Court also held that the order of the WERC which prohibited the board from permitting any employee to appear and speak at meetings of the board on matters subject to collective bargaining was not unconstitutionally vague, and that the board lacked standing to raise the issue because the matter on which the employee was permitted to speak was admittedly a matter subject to negotiations and the board could not, therefore, challenge the WERC's order for vagueness. (*Madison*, supra, at 215, 216).

Section 111.70 as interpreted by the Wisconsin Supreme Court, thus prohibits municipal employees in Wisconsin from appearing before and speaking at regular meetings of their government employer on subjects that have a fundamental personal bearing on them as employees and as individual citizens, and thereby infringes upon their rights of free speech and to petition their government for a redress of grievances guaranteed by the First and Fourteenth Amendments to the U.S. Constitution. The infringement of rights extends to thousands of individuals in Wisconsin, and, if upheld by this court, has the potential of impairing the rights of several million individuals throughout the country.

In October, 1973, there were 203,662 full-time equivalent employees of state and local units of government in Wisconsin. Of this number, 51,583 represented state employees, and 152,079 represented employees of local units of government, including 57, 223 municipal (city and village) employees, 56,500 school district employees, 33,209 county employees, 4,582 town employees and 565 employees of special districts. At the same time there were 9,577,922 full-time equivalent

employees of state and local units of government nationwide. This figure represents 2,546,728 full-time equivalent state employees and 7,031,264 full-time equivalent employees of local units of government.[1]

As of October, 1972, of the 8.6 million full-time equivalent employees of state and local units of government nationwide, 4.3 million, or 50.4% belonged to employee organizations. School district employees demonstrated the greatest degree of organization with 62% of all full-time employees organized. Nearly 70% of all full-time teachers (who accounted for almost one-third of all full-time employees of state and local units of government) were organized in October, 1972. Of the 78,268 state and local units of government in this country in October, 1972, 10,737, or 13.7% of these governments engaged in collective negotiations or meet and confer discussions. In Wisconsin at that time, 19.5% of the state and local units of government (477 out of 2,448) engaged in collective negotiations. Of the 417 school districts identified in October, 1972, 322 of 77.2% engaged in collective negotiations.[2]

The WERC decision which was upheld by the Wisconsin Supreme Court thus precludes or has the potential for precluding thousands of citizens of the State of Wisconsin from the full exercise of their First Amendment rights. A decision by this Court upholding the

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[1]U.S. Bureau of the Census; Public Employment in 1973.

[2]U.S. Bureau of Census, 1972 Census of Governments, Public Employment, Management-Labor Relations in State and Local Governments.

Wisconsin Supreme Court decision similarly has the potential for precluding several million public employees nationwide of the full exercise of their First Amendment rights.[3]

Equally significant is the impact or potential impact of such a decision on state and local units of government in Wisconsin and throughout the nation. The decision has the harmful, or potentially harmful effect of depriving bodies politic of access to information from a large group of citizens who not only have a substantial personal stake in the decisions made by these bodies, but, as a class, are the members of a community most likely to have an informed and definite opinion on matters within the competence of these bodies.

Amicus believes that in light of the need of governmental bodies to have access to all possible sources of information, the state's interest in union security and union exclusivity must yield to the state's more fundamental interest in good government. Information provided governmental bodies on matters subject to collective bargaining at the bargaining table, or through other union procedures, is an inadequate substitute for information that can be provided by public employees.

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[3]Employees in the federal civil service have a statutory right to petition Congress and Members of Congress. "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." (5 U.S.C. s. 7102) See: Comment, Dismissals of Public Employees for Petitioning Congress: Administrative Discipline and 5 U.S.C. Section 652 (d), 74 *Yale L. J.* 1156 (1965); Note, The Right of Government Employees to Furnish Information to Congress: Statutory and Constitutional Aspects, 57 *Va. L. Rev.* 885 (1971).

Matters subject to collective bargaining not only have a direct bearing on public employees but a direct or indirect impact on the services performed by government. Public employees, as well as all other persons, must have the right of access to governmental bodies, within the limits of their proscribed procedures, even on matters relating to wages, hours and working conditions, not only because of their personal stake in such access, but because public bodies must depend on this information for the decisions they are required to make.

II.

The First And Fourteenth Amendments To The U.S. Constitution Protect The Right Of Public Employees To Appear Before And Address A Governmental Body Even On Matters That Are Subject To Collective Bargaining

A. A law which infringes on the constitutionally protected rights of free speech and peaceable assembly and the right to petition for a redress of grievances cannot be sustained merely because it was enacted for the purpose of dealing with some evil within the state's legislative competence. A state cannot foreclose the exercise of constitutional rights under the First Amendment by mere labels.

It is well established that First Amendment rights are not absolute and may be circumscribed to further a sufficiently strong public interest. The First Amendment does not imply that states are without power to translate into law local policies to promote health, safety, morals and welfare (*Carpenters and Joiners Union v. Ritter's Cafe*, 315 U.S. 722, 726, 62 S.Ct. 807), and a state "may regulate labor relations with the view toward protecting the public interests" (*Thomas v. Collins*, 323 U.S. 516, 532,

65 S.Ct. 315). First Amendment rights are not immunized from regulation when used as an integral part of conduct that violates a valid statute, and such rights may not be used as a means or pretext for achieving substantive evils which the legislature has the power to control. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 69 S.Ct. 684; *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609.

However, all restrictions on First Amendment rights are not valid merely because the state has enacted a law dealing with some evil within the state's legislative competence. *United Mine Workers of America v. Illinois State Bar Association*, 389 U.S. 217, 88 S.Ct. 353. First Amendment rights may be circumscribed only when necessary to further a sufficiently strong public interest, and any significant restriction on such rights carries with it a heavy burden of justification. *Greer v. Spock*, U.S. , 96 S.Ct. 1211, 1219, 1220 (Mr. Justice Powell, concurring). The preferred place given First Amendment rights give such rights a sanctity not permitting dubious intrusions. Thus any attempt to restrict free speech, assembly and petition must be justified by a clear public interest threatened not doubtfully or remotely but by a clear and present danger. *Thomas*, supra, at 530.

A state may not under the guise of prohibiting misconduct ignore constitutional rights under the First Amendment and cannot foreclose the exercise of such rights by mere labels. *NAACP v. Button*, 371 U.S. 415, 429, 83 S.Ct. 328. Laws which actually affect the exercise of such vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the state's legislative competence, or even because

the laws do in fact provide a helpful means of dealing with an evil. *United Mine Workers*, supra, at 222. It is imperative that courts weigh the circumstances and appraise the substantiality of reasons advanced in support of challenged regulations. *Thornhill v. Alabama*, 310 U.S. 88, 96, 60 S.Ct. 736. Where the line should be drawn rests not on generalities but on a concrete clash of particular interest. *Thomas*, supra, at 531.

B. It is not necessary in order to preserve the exclusive status of the bargaining representative, that the right of public employees to appear before and address a governmental body on subjects related to wages, hours and working conditions be restricted.

Amicus concurs in appellant's concession that speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to the exclusive representative of a bargaining unit. However, the state, in regulating labor relations, cannot constitutionally prohibit public employees from addressing and petitioning their employing governmental body at a public meeting of that body even on matters subject to bargaining. Nor can a state, in regulating labor relations, prohibit a governmental employer from listening to and receiving petitions from its employees at a public meeting merely by labeling such activity "negotiating."

While the First Amendment cannot be used as a cover to indulge in conduct which in fact interferes with the

rights of municipal employees to bargain collectively through representatives of their own choosing (s. 111.70 (3) (a) 1, Wis. Stats.), or in fact amounts to a refusal to bargain collectively with a representative of the majority of its employees (s. 111.70 (3) (a) 4, Wis. Stats.), this is not the case where a public employee addresses and petitions a governmental employer, and the employer merely listens to that employee, at a public meeting of that governmental body. "What the group, selected as sole bargaining agent in the election to select such representative, won was the right to represent employees in the bargaining unit in bargaining sessions and negotiations with the employer. What it did not win was the right to speak during a public discussion period at a public meeting or a public body with all other voices of individual teachers or groups of teachers to be silenced." *Madison,* supra, at 220 (Justice Robert W. Hanson dissenting). Conversely, what the employees lost when they delegated to their representative the right to bargain with their governmental employer was the right to meet and confer with that employer with respect to wages, hours and working conditions with the intention of reaching an agreement. However, governmental employees cannot constitutionally be required to delegate the rights of free speech, assembly and petition to their collective bargaining representative in those instances where it is not necessary to serve the function of collective bargaining. Cf. *Skayd v. Ringling Rock Lodge No. 665, Brotherhood of Railroad Trainmen of Pottstown,* 113 A. 70, 270 Pa. 67; *Harrison v. Brotherhood of Railroad Clerks,* (Ky.) 271 S.W. 2d 852. Collective bargaining can limit economic freedom, but it cannot limit the free exchange of information.

Public employees have a substantial interest in addressing their governmental employer on matters which are subject to collective bargaining. These are matters which have a direct effect on them personally as employees and as citizens. The interest of public employees in addressing their governmental employer is particularly important in those instances where a union's institutional goals and an employee's individual goals may not coincide (e.g. union security provisions), where a subject is one having a fundamental personal bearing on the employee as an individual,[4] and where the subject has ramifications on the extent and quality of services performed by the government of employment.

The necessity of exclusivity in bargaining relationships does not include the need to silence employees in a public forum. Permitting a public employee to speak before a governmental body is not in derogation of the union's exclusive right to bargain where all the employer does is listen. Merely listening does not undermine the statutory right of the union to bargain, or of employees to bargain through representatives of their own choosing. Listening involves no direct dealing with individual employees or bypassing of the collective bargaining representative. Any danger of chaos in labor relations from such activity is dubious at best. Nor can any interest in preserving the collective clout of public employees justify an invasion of First Amendment rights, for "the concept that government may restrict the speech

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[4]e.g. the WERC has determined that a requirement that public employees live within the municipality of employment is a mandatory subject of bargaining. *City of Brookfield* (11406-A, B) (Aff. Waukesha Co. Cir. Ct. No. 31923).

of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment which was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources.'" *Buckley v. Valeo,* U.S. ,96 S.Ct. 612, 649.

The fact that such speech is intended to or may have the effect of inducing action by the governmental employer in opposition to the action desired by the bargaining representative does not justify an invasion of First Amendment rights merely because the speaker is an employee of the governmental unit, for every expression of opinion on matters that are important has at least the potentiality of inducing action in the interest of one rather than another group in our society. *Thornhill,* supra, at 104. The right of free speech, assembly and petition is not intended to protect merely the right to describe facts. It includes the opportunity to persuade to action, and even vigorous advocacy of lawful ends against government intrusion. *Button,* supra, at 429.

In summary, *Amicus* submits that since matters subject to collective bargaining have a direct impact on them, public employees have an important stake in addressing their government employer on these subjects. Permitting public employees to speak on subjects of bargaining at a public meeting of a governmental body does not invade the exclusivity of the bargaining relationship. Such speech causes no significant harm to the right of municipal employees to bargain collectively through representatives of their own choosing or to the state's valid interest in regulating labor relations.

C. State labor policy must yield to First Amendment rights where the exercise of such rights is necessary to preserve the informed operation of government.

This court has held that the nature of the forum and conflicting interests are important in determining the degree of protection afforded by the First Amendment to the speech in question. *Lehman v. City of Shaker Heights,* 418 U.S. 298, 94 S.Ct. 2714. Where the forum for expression of First Amendment rights is a meeting of a governmental body there exists a First Amendment forum of the highest order. The decision in this case not only infringes on free speech but speech directed to a governmental body. Abridgement of free speech in this context not only impairs opportunities for public education, but impairs well informed decision making by elected public officials. Surely any public interest in regulating labor relations must yield when such regulations restrict the right of individuals to address their government and thereby impair the access of governmental officials to information necessary to their decision making process.

This court has jealously guarded the right of individuals to petition government since it not only preserves the right of people to make their wishes known to their governmental representatives, but also insures access of government to information upon which decisions are to be made. In *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, this court was called upon to consider whether the Sherman Act's prohibition on combinations in

restraint of trade was applicable to activities which included solicitation of government action with respect to passage and enforcement of laws. The court construed the Sherman Act so as not to apply to such activities because such a construction "would raise important constitutional questions" and the court was unwilling to impute to Congress an intent to invade the right to petition secured by the First Amendment or "to regulate political rather than business activities." *Noerr*, supra, at 137, 138. The court held that a decision restricting solicitation of government action would impair the representative nature of government. "In a representative democracy such as this, these branches of government (legislative and executive) act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." (*Noerr*, supra, at 137). A holding that political activity can be regulated would amount to a holding "that the government retains the power to act in a representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes..." *Noerr*, supra, at 137. The court further held that even though influencing legislation may be directed toward an unlawful purpose, this does not justify a restriction on a right to petition, because:

> "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring an advantage to themselves and a disadvantage to their competitors.... Indeed it is quite probably people with such a hope of personal advantage *who provide much of the information upon which governments must act.* A construction ... that would disqualify people from taking a public position on matters in which they are financially interested *would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them."* (emphasis added) *Noerr*, supra, at 137.

The court stated that it is only where an attempt to influence legislation is a "mere sham" to cover up what is actually nothing more than an attempt to engage directly in an unlawful practice that these important interests might be overcome. *Noerr*, supra, at 144.[5]

The basis of the right to petition is a democracy's interest in governmental responsiveness to the electorate and in government access to as many sources of information as possible. To the extent that a governmental body cannot listen to its employees, these important interests are diminished. Political bodies should not be precluded from hearing from their employees on the basis of legislatively imposed representation for bargaining purposes. Surely there is no abuse of the rights of others or "mere sham" with a goal toward undermining the exclusive representative for purposes of collective

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[5]Cf. *California Motor Transport Company v. Trucking Unlimited*, supra, where the court held that concerted activity, by action in state and federal administrative and judicial proceedings, in violation of the Clayton Act, may not be constitutionally protected where such activity is found to be a sham because the use of such forums is without probable cause and regardless of the merits and for the purpose of barring competitors from meaningful use of the same forums.

bargaining where a governmental employer merely listens to the petition of its employees on matters subject to collective bargaining.

It is just as important for government employees to speak and for governmental employers to have access to information where wages, hours and working conditions are involved as on any other matter. From the employee's standpoint, as discussed above, wages, hours and working conditions have a direct bearing on them. The governmental employer has an interest in employee's views on these subjects since it is these employees who carry out the governmental function of the employer. Moreover, many decisions relating to wages, hours and working conditions have a direct or indirect impact on governmental operations beyond that which directly affects employees. "Everything a teachers' union does affects the quality of education, and the cross-over from straight bread-and-butter concerns to the nature of the educational system is profound." A. H. Raskin, Politics Up-Ends the Bargaining Table, *Public Workers and Public Unions*, p. 142 (Sam Zagoria ed.) Prentice-Hall 1972.

In this respect it must be remembered that a school board is more than an employer. It is a body politic, the members of which are elected by the citizenry and charged with the important function of educating the community's children. Decisions made by this body involve sensitive political, social and idealogical questions and the need for responsive and enlightened decision making is great. Teachers, too, are more than employees. They are professionals in the field of education. To absolutely preclude these employees from addressing the merits of various bargaining proposals as they affect educational

quality would preclude school boards from having access to information which goes to the heart of their function. Union input on such matters is insufficient. "Teachers are, as a class, the members of a community most likely to have informed and definite opinions" on such matters. *Pickering v. Board of Education*, 391 U.S. 563, 572, 88 S.Ct. 1731 (1968). A holding that a body politic may not receive information relating to wages, hours and working conditions from its employees substantially impairs governmental access to necessary information and, therefore, impairs the power of government to act.

The WERC in two "declaratory rulings"[6] has determined the scope of subjects upon which public school boards are required to bargain collectively with the representative of school employees.[7] The WERC interpreted MERA as requiring an accommodation between the existing school statutes and the provisions of MERA, and also as recognizing that certain matters are

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[6]Sec. 111.70 (4) (b), Wis. Stats.

[7]Collective bargaining is defined in MERA as follows: "Collective bargaining means the performance of the mutual obligation of the employer ... and the representatives of its employees, to meet and confer at reasonable times, in good faith with respect to wages, hours and conditions of employment with the intention of reaching an agreement.... The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and duties to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured public employees by the constitutions of this state and of the United States and by this subchapter." s. 111.70 (1) (d), Wis. Stats.

reserved to management. The WERC therefore held that there is a *mandatory* duty to bargain collectively on matters relating to the duties and responsibilities delegated to and required of school boards by statute, which do not concern basic educational policy and which primarily affect wages, hours and conditions of employment; but that matters which do concern basic educational policy but by their impact secondarily affect wages, hours and conditions of employment are subject to mandatory bargaining only with respect to the impact of such matters on wages, hours and conditions of employment. The WERC also held, however, that subjects designated non-mandatory subjects of bargaining are *permissibly* bargainable and defined permissive subjects as "those that may be proposed and regarding which bargaining may occur even to final agreement; but upon which the proposing party may not insist to the point of bringing the entire negotiations to an impasse." The WERC has thus determined, that subjects such as the school calendar, just cause for discipline or dismissal, layoff of teachers, access of teachers to their files and records, and some aspects of supervision and evaluation of teachers are mandatorily negotiable, and that matters such as class size, contact hours, reading programs, summer programs, curriculum, pilot programs for emotionally disturbed students, in-service programs for teachers, as well as proposals relating to methods of dealing with "problem students" are permissively negotiable.[8]

/[8] *City of Beloit*, No. 11831-C, aff. Dane Co. Cir. Ct. Nos. 144-272, 144-406 (appeal to Wisconsin Supreme Court pending); *Oak Creek-Franklin Joint City School District No. 1*, No. 11827-D, aff. Dane Co. Cir. Ct., Case No. 144-473.

Statutes, as well as agency and court interpretations of such statutes, concerning the scope of collective bargaining vary widely among states. The scope of bargaining in any given state is subject to expansion or restriction by action of the state legislature. Moreover, "realistically no legal walls are going to keep public employee unions from moving increasingly into the policy field ... Manpower is so much a bedrock of all municipal services that public unions will find ways to tie considerations of job security or working conditions into every policy issue they want to have a voice in." *Raskin*, supra, at 143.

The order of the WERC broadly prohibits the school board from permitting an employee to speak on "matters subject to collective bargaining" and is, in this respect, unconstitutionally vague and overbroad. The order acts as a prior restraint of pure speech directed to a governmental body on matters which are of a legitimate concern to that body. Not only is the phrase "matters subject to collective bargaining" vague in that it is constantly subject to interpretation by the courts; it is also overbroad in the sense that, even if its definition were clearly understood, information would be kept from the board by virtue of the order, that is necessary or useful to its government function from sources most appropriately positioned to give it. The right to receive information in this respect is not sufficiently offset by any compelling state interest, regardless of the merits of this particular case.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1975

CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED,

Appellees.

On Appeal from the Supreme Court of Wisconsin

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE

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BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the largest association of business and profes-

[1] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

sional organizations in the United States, and is the principal spokesman for the American business community. The Chamber of Commerce has a direct membership of over 52,000 business firms and an underlying membership of approximately 5 million individuals and firms.

The Chamber of Commerce has a direct and legitimate interest in the issues raised in the present case. As citizens in virtually every community in this country, our individual and corporate members are vitally interested in all facets of state and local government, including public sector employment relations. Members of the business community are especially concerned with the advancement of sound personnel practices and employee relations which will insure the continued and uninterrupted operation of governmental functions. Additionally, the business community provides through its tax dollars a substantial portion of the funds which support state and local governments and it shares every citizen's deep concern for the prudent expenditure of those tax dollars.

Because of these vital and legitimate interests of its members, the Chamber of Commerce respectfully submits the following brief as amicus curiae. The views expressed by the Chamber of Commerce on behalf of the business community reflect extensive experience with labor relations and collective bargaining in the private sector, and are intended to assist this Court in its resolution of the issues presented in the present case.

SUMMARY OF THE ARGUMENT

The decision of the Supreme Court of the State of Wisconsin constitutes a limitation on or regulation of the rights of public school teachers to speak, assemble, and to petition their government, which rights are protected by the First Amendment to the Constitution of the United States. It is the position of the Chamber of Commerce that the Wisconsin Supreme Court's decision is an impermissible infringement on these protected rights, and the

Chamber of Commerce therefore urges that the Wisconsin Supreme Court's decision be reversed.

The Wisconsin Supreme Court has ordered the School Board in this case to prohibit its teacher employees from speaking at public meetings of the School Board on matters subject to collective bargaining between the Board and the Union representing the teachers. The Court argues that Wisconsin's Municipal Employment Relations Act, which it has found to be constitutional, provides that the Union is the exclusive bargaining representative for the teachers in the unit. Accordingly, any conversation between the Board and the teachers which can be characterized as negotiation is in derogation of the Union's exclusive representation status. In the Court's opinion a teacher who speaks at a public meeting of the School Board on matters subject to collective bargaining is negotiating with the School Board, and this speech can constitutionally be prohibited in order to prevent chaos in labor-management relations, an interest which the state has a right to protect.

It is the Chamber's position that the decisions of this Court establish that the state has no compelling interest in abridging the right of an ordinary citizen to express, at a public meeting, his views on matters in which he has a direct interest as a taxpayer, matters such as those which are being negotiated between his school board and the union representing the board's teachers. The fact that this taxpayer's views may affect the content of the bargaining package offered by the school board to the union does not pose a grave and immediate danger to interests which the state may lawfully protect. A school board which conditions its offer to a union on the views of those citizens to whom the board must answer is functioning in the best tradition of government.

The situation should be no different simply because the citizen involved happens also to be a school teacher. Teachers, as individual citizens, also have a right to speak to and petition their government. Yet, according to the

Wisconsin Supreme Court, the state, through the school board, must prohibit a teacher from attempting to do what any ordinary citizen has a right to do. The Wisconsin Court in issuing its order, makes no showing in this case of grave and immediate danger to interests which the state has a right to protect. Therefore, the Court's prohibition can only rest on the teacher's status as a public employee. However, this Court has consistently rejected the premise that the First Amendment rights of a school teacher may be abridged by the state merely because the teacher is a public employee if no compelling or overriding state interest justifying such an abridgement has been demonstrated.

The Supreme Court of Wisconsin has also erred by giving an overly broad construction to the "exclusive bargaining representative" provisions of Wisconsin's Municipal Employment Relations Act, a construction which brings those provisions into collision with the First Amendment rights of the school teachers in this case. The net effect of the Wisconsin Court's decision is that all speech between a public employer and a public employee which can be characterized as negotiation, as that term has been defined by the Wisconsin Court, is in derogation of the principle of exclusivity and can therefore be prohibited, regardless of the context in which the speech occurs. Yet the Wisconsin Supreme Court has offered no independent showing that negotiation of the type proscribed by the Court will pose grave and immediate danger to the state's interest in collective bargaining if it is permitted to take place in the context of a public meeting of the School Board. No showing of grave and immediate danger is made because none exists.

Experience in the private collective bargaining context has shown that broader limits on speech and narrower limits on exclusive representation than those struck by the Wisconsin Supreme Court can be permitted without doing grave and immediate harm to the public policy which favors collective bargaining in private employment. Accordingly, the Wisconsin Supreme Court could have,

and should have, construed more narrowly the "exclusive bargaining representative" provisions of Wisconsin's Municipal Employment Relations Act so as to avoid encroaching on the First Amendment Rights of the teachers in this case.

ARGUMENT

I.

THE DECISION OF THE SUPREME COURT OF THE STATE OF WISCONSIN CONSTITUTES AN IMPERMISSIBLE INFRINGEMENT ON THE FIRST AMENDMENT RIGHTS OF SCHOOL TEACHERS.

One Holmquist, a teacher employee of the School Board and a member of the bargaining unit represented by the Union, solicited by petition the views of his colleagues on a fair share (agency shop) agreement then being negotiated between the School Board and the Union. The majority of teachers solicited by Holmquist expressed reservations about the fair share provision. Thereafter, at its regular board meeting, during the portion of the meeting devoted to public appearances, the School Board permitted a number of individuals, including Holmquist, the opportunity to speak. Holmquist thereupon communicated to the School Board the existence and content of his petition. He did not ask the School Board to reject the fair share provision; he merely asked that the Board defer its decision pending further study of the matter. The School Board simply listened to Holmquist, making no response of any kind to the substance of his request.

Following the public meeting, the School Board decided to accept the total package demanded by the Union, except for the fair share provision, and the Union accepted the Board's offer at the next bargaining session. Subsequently, the Union filed prohibited labor practice charges with the Wisconsin Employment Relations Commission

(WERC). WERC concluded that the School Board had committed prohibited labor practices in violation of the Municipal Employment Relations Act, Sec. 111.70(3)(a)1 and 4, Stats., (MERA), that is, the Board had refused to bargain collectively with the exclusive majority representative of the teachers and the Board had interfered with, restrained, or coerced the teachers in the exercise of their right to bargain collectively through representatives of their own choosing. Accordingly, WERC issued the following order:

> [The School Board] [s]hall immediately cease and desist from permitting employees, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc.

The Wisconsin Supreme Court, in due course, affirmed WERC's decision and order.

Clearly, WERC's decision and order as affirmed by the Wisconsin Supreme Court constitute a limitation on or regulation of rights protected by the First Amendment to the Constitution of the United States. The Chamber of Commerce of the United States submits that the Wisconsin Supreme Court's decision affirming WERC's decision and order is an impermissible infringement on the First Amendment rights of those school teachers covered by the order. The Wisconsin Court has singled out a group of citizens having constitutional rights common to the general citizenry simply because that group consists of school teachers having an employment relationship with the state; the Court then imposed conditions on that employment relationship which limit the teachers' exercise of their constitutional rights. Such a result is contrary to the decisions of this Court.

The First Amendment rights which are raised in the present case are the rights of free speech, of assembly, and of petition. These rights are secured from infringement by the states through the Due Process clause of the Four-

teenth Amendment to the United States Constitution.[2] *Gitlow v. New York*, 268 U.S. 652 (1925); *United Mine Workers v. Illinois Bar Assoc.*, 389 U.S. 217 (1967).

WERC's decision and order, and hence the Wisconsin Supreme Court's decision, construe the "exclusive bargaining representative" provisions of Wisconsin's MERA. Thus, Wisconsin's MERA has been construed to have a restrictive impact on the constitutional rights of those school teachers whose employment is regulated by the Act. In testing the constitutional validity of legislative acts and, by extension, the application of those acts to specific cases, this Court indulges a presumption in favor of their validity. The presumption of constitutionality of a statute dealing with a subject clearly within the scope of the police power prevails in the absence of some factual foundation of record for declaring it to be unreasonable. *O'Gorman & Young v. Hartford F. Ins. Co.*, 282 U.S. 251 (1931). However, in cases in which the legislative act attempts to limit or otherwise infringe First Amendment rights, such as speech, assembly, and petition, this Court examines it very carefully to the point of indulging a presumption against the constitutionality of the act. *Thomas v. Collins*, 323 U.S. 516 (1945); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Schneider v. Irvington*, 308 U.S. 147 (1939); *United States v. C.I.O.*, 335 U.S. 106 (1948). As Justice Rutledge (joined by Justices Black, Douglas, and Murphy) stated in his concurring

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[2]The First and Fourteenth Amendments to the United States Constitution, in pertinent part, are the following:

Article I.

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article XIV.

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

opinion in *United States v. C.I.O., supra,* 335 U.S. at 139-140:

> [W]hen regulations or prohibitions touch [First Amendment rights], this Court is duty bound to examine the restrictions and to decide in its own independent judgment whether they are abridged within the Amendment's meaning. [Footnote omitted.] That office cannot be surrendered to legislative judgment, however weighty, although such judgment is always entitled to respect.
>
> As the Court has declared repeatedly, that judgment does not bear the same weight and is not entitled to the same presumption of validity, when the legislation on its face or in specific application restricts the rights of conscience, expression and assembly protected by the Amendment, as are given to other regulations having no such tendency. [Footnote omitted.] The presumption rather is against the legislative intrusion into these domains. For, while not absolute, the enforced surrender of those rights must be justified by the existence and immediate impendency of dangers to the public interest which clearly and not dubiously outweigh those involved in the restrictions upon the very foundation of democratic institutions, grounded as those institutions are in the freedoms of religion, conscience, expression and assembly. Hence doubtful intrusions cannot be allowed to stand consistently with the Amendment's command and purpose [footnote omitted], nor therefore can the usual presumptions of constitutional validity, deriving from the weight of legislative opinion, in other matters more largely within the legislative province and special competence, obtain.

The Wisconsin Supreme Court's decision must be examined against this background.

The First Amendment right of free speech includes the freedom to express one's opinion on public questions. *New York Times Co. v. Sullivan,* 376 U.S. 254, 269 (1964). The First Amendment requires that debate on public issues be uninhibited, robust, and wide open. *Id.* at 270. The protection given free speech by the Federal Constitution was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people. *Id.* at 269. It is a prized American privilege to speak one's mind on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion. *Id.* Therefore, the First Amendment secures the widest possible dissemination of information from diverse and antagonistic sources. *Id.* at 266.

> [A]bove all else, the First Amendment means the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations omitted.] To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." [Citation omitted.] *Police Department v. Mosley,* 408 U.S. 92, 95-96 (1972).

The rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. *United Mine Workers v. Illinois Bar Assoc.,* 389 U.S. 217, 222 (1967). Maintaining opportunities for free political discussion so that government may be responsive to the will of the people and so that changes may be obtained by lawful means is essential to the security of the country and is a fundamental principle of our constitutional system. *Edwards v. South Carolina,* 372 U.S. 229, 238 (1963). Every person or group engaged in trying to persuade governmental action is exercising the First Amendment right of petition. *Liberty Lobby, Inc. v. Pearson,* 390 F.2d 489 (D.C. Cir. 1968, Burger, J.). The right to petition extends to all departments of the government. *California Transport v. Trucking Unlimited,* 404 U.S. 508, 510 (1972). The grievances for the redress of which the rights of petition and assembly are insured under

the First Amendment are not solely religious or political ones, but include economic grievances as well. *Thomas v. Collins, supra,* 323 U.S. at 531 (1945). The right to discuss and inform people concerning the advantages and disadvantages of labor unions and of joining them is protected, not only as a part of free speech, but as a part of free assembly. *Id.* at 532. The right to assemble peaceably and the right to petition are intimately connected, in origin and in purpose, with the other First Amendment rights of free speech and free press. Though not identical, they are all inseparable. *United Mine Workers, supra,* 389 U.S. at 222.

Although this Court has held that the rights guaranteed by the First Amendment are not absolute, the standard which the Court has often announced and applied in cases involving the abridgement of speech is a stringent one. There must be a clear, present, and imminent danger that the speech in question will bring about the substantive evils which the legislature has a right to prevent or that the speech in question poses a clear, present, and imminent danger to interests which the state may lawfully protect. *Schenck v. United States,* 249 U.S. 47 (1919); *Board of Education v. Barnette,* 319 U.S. 624 (1943); *Dennis v. United States,* 341 U.S. 494 (1951); *Brandenburg v. Ohio,* 395 U.S. 444 (1969). Any system of prior restraints on expression comes to this Court bearing a heavy presumption against its constitutional validity, and a party who seeks to have such a restraint upheld thus carries a heavy burden of showing justification for the imposition of such a restraint. *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971).

The authority of government to limit or regulate the exercise of the rights of assembly and petition is similarly restricted. Government may not flatly deny the right of the people peaceably to assemble to petition the government for a redress of grievances. *United States v. Crawthers,* 456 F.2d 1074 (4th Cir. 1972). Nor can the government do indirectly what it cannot do directly:

> The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition or assembly as such. *United Mine Workers, supra,* 389 U.S. at 222.

Accordingly, government may not do such things as permit public meetings in support of government policy and at the same time forbid public meetings that are opposed to that policy. *Crawthers, supra,* 456 F.2d at 1079. Moreover, courts are expected to construe statutes narrowly so as to avoid constitutional questions, such as questions concerning First Amendment rights. *Schneider v. Smith,* 390 U.S. 17, 26 (1968). Laws which actually affect the exercise of these rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the state's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. *United Mine Workers, supra,* 389 U.S. at 222. Nothing less than an overriding and compelling government interest or a showing of grave and immediate danger to interests which the government may lawfully protect is sufficient to justify governmental intrusion into First Amendment rights. *See, Gibson v. Legislative Investigating Committee,* 372 U.S. 539 (1963); *Board of Education v. Barnette, supra.* As this Court stated in *Thomas v. Collins, supra,* 323 U.S. at 530:

> [A] preferred place [is] given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. [Citations omitted.] That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. [Citations omitted.]
>
> For these reasons any attempt to restrict these liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present dangers. [Footnote omitted.] The rational connection between the remedy provided and the evil to be curbed, which in other contexts might

> support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, *must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.* It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. [Emphasis supplied.]

That these standards are imposed on the states through the Due Process clause of the Fourteenth Amendment makes them no less stringent. As this Court stated in *Barnette, supra,* 319 U.S. at 639:

> In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

The Wisconsin Court acknowledged, indeed cited, the pertinent authority of this Court governing the abridgement of First Amendment rights. Nevertheless, by affirming WERC's decision and order, the Wisconsin Court did all of the following: 1) prohibited the School Board's teacher employees from speaking freely on matters of public interest; 2) imposed prior restraints on the speech of these teachers; 3) restricted their right peaceably to assemble; and 4) restricted their right to petition the School Board. The Wisconsin Court's decision can be sustained by nothing less than a showing that a clear public interest was threatened, not doubtfully or remotely, but by a clear and present public danger, actual or intended. The Chamber of Connerce submits that the Wisconsin Court has set forth no such showing. The Wisconsin Court's justification for the constitutionality of the "exclusive bargaining representative" provisions in Wisconsin's MERA is inadequate to support the broad restrictions in the present case. Moreover, the constitutionality of the "exclusive bargaining representative" provisions in Wisconsin's MERA are not at issue in this case. What is at issue is the constitutionality of the Wisconsin Court's application of those provisions. In order to prevent relative chaos in labor-management relations, the Wisconsin Court might constitutionally be permitted to prohibit a public employer from sitting down in his office with a handful of employees and hammering out a contract with them in derogation of the union's representation status. But can the Wisconsin Court, on such a slender premise, constitutionally be permitted to prohibit a public employee from exercising at a public meeting his rights of speech, assembly, and petition? We think not. In fact, the State has no compelling interest in such a pervasive abridgment of First Amendment rights.

One can easily imagine the following hypothetical situation. A tax-paying citizen of the school district has children enrolled in the district's schools. He is deeply concerned that teachers in the district may be required to pay their so-called "fair share" to a union or risk losing their jobs.

The tax-paying citizen has neither joined this union nor elected it to public office. It may be that this particular citizen happens to believe the admonition that one's heart is where one puts his money. It may be that he happens to believe that teachers, as public servants, owe their allegiance to the public they serve. It may even be that he happens to believe that no American worker, least of all a public employee, should be required to pay tribute to a private organization in order to work in his chosen field. Whatever his beliefs, this citizen is entitled to them. Moreover, he has the right peaceably to convert others to his beliefs and the right to take lawful action to petition and to persuade his elected representatives to adopt and to implement his beliefs.

In exercising these rights he decides to solicit teachers in the district and ascertain their views on the fair share agreement. He discovers that a majority of the teachers he solicits have reservations about the fair share agreement. He requests and is permitted the opportunity to speak at a public school board meeting during the portion of the meeting devoted to public appearances. He communicates to the school board the results of his survey and asks, not that the board defer its decision pending further study, but that the board reject the fair share proposal in its entirety. If the board were persuaded by the arguments of this citizen, one of the board's constituents, and if, subsequently, the board refused to agree to a fair share provision in its contract with the union, would the board have violated its duty to bargain in good faith? Would the board have interfered with, restrained, or coerced its teachers in the exercise of their right to bargain collectively through representatives of their own choosing? We submit that it would not. Yet such a citizen could achieve the same result as Holmquist achieved in the present case. Moreover, the reasoning used by the Wisconsin Supreme Court to reach its decision in the present case could be used equally to prohibit the board from entertaining the views of a citizen on matters being negotiated between the board and the union. Nevertheless, the Court could not properly enforce such a prohibition.

No compelling state interest could override the right of a citizen to express, at a public meeting, his views on matters in which he has a direct interest as a taxpayer, matters such as those which are being negotiated between his school board and the union representing his children's teachers. The fact that this taxpayer's views may affect the content of the bargaining package offered by the school board to the union does not pose a grave and immediate danger to interests which the state may lawfully protect. A school board which conditions its offer to a union on the views of those citizens to whom the board must answer is functioning in the best tradition of government. As this Court stated in *Barnette, supra,* 319 U.S. at 641:

> There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

In such a context any effort by the state to eliminate the board's access to the views of its constituents or to prohibit citizens from having access to their school board would be impermissible.

The situation should be no different simply because the citizens involved happen also to be school teachers. The state, through the school board, cannot prohibit a member of the general public from attempting to affect the outcome of collective bargaining by speaking at a public meeting on the subjects being negotiated. Yet according to the Wisconsin Supreme Court the state, through the school board, must prohibit a teacher from attempting to do the same thing. Such a distinction can only rest on the teacher's status as a public employee. However, this Court has consistently rejected the premise that the First Amendment rights of a school teacher may be abridged by the state merely because the teacher is a public employee if no compelling or overriding state

interest justifying such an abridgement has been demonstrated.

This Court has looked cautiously at attempts to abridge the First Amendment rights of public school teachers. In *Shelton v. Tucker*, 364 U.S. 479 (1960), this Court reaffirmed its belief that constitutional rights must especially be protected in the nation's schools. The Court stated:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. "By limiting the power of the States to interfere with the freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguard of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." [Citation omitted.] *Id.* at 487.

Thus, the Court has unequivocally rejected the premise that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). *See, e.g. Wiemann v. Updegraff*, 344 U.S. 183 (1952); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker, supra.*

Having failed to set forth any constitutionally acceptable justification for its decision, the Wisconsin Supreme Court cannot sustain its broad infringement on the First Amendment rights of the school teachers in this case. Accordingly,

those teachers employed by the Madison School Board who desire to address the Board at a public meeting should be regarded as the members of the general public they seek to be, even though they happen to address the Board on matters subject to collective bargaining between the School Board and the Union. *See, Pickering, supra.*

II.

A SCHOOL BOARD EMPLOYER WHICH, AT A PUBLIC MEETING, MERELY LISTENS WHILE A SCHOOL TEACHER EMPLOYEE BRINGS TO THE BOARD'S ATTENTION UNSOLICITED FACTS PERTAINING TO THE EMPLOYMENT RELATIONSHIP DOES NOT THEREBY BARGAIN WITH THAT EMPLOYEE.

By holding that the School Board negotiated with Holmquist when it merely listened to him while he brought to the Board's attention unsolicited information pertaining to the fair share agreement, the Wisconsin Supreme Court has given an unnecessarily broad definition to the term "negotiate." The Court then carried its concept of negotiation far outside the traditional collective bargaining context and imposed it on a meeting of the School Board which the general public was invited to attend and at which they were invited to express their views. Although the Board's teacher employees, as citizens, would otherwise have had the right to speak and to petition the Board on any matter they chose, the teachers were prohibited from speaking to the Board on matters pertaining to wages, hours, and working conditions because the Wisconsin Court had characterized this meeting as a part of the collective bargaining process.

In reaching its decision the Wisconsin Court reasoned that the principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts and the First Amendment rights of those persons are, to that extent, thereby infringed. The collective bargaining process of necessity subordinates the interests

of an individual employee to the collective interests of all employees in a bargaining unit. The Wisconsin Court apparently assumed that permitting negotiations outside the majority bargaining unit would produce relative chaos in labor-management relations. On the premise that the necessity to avoid the dangers attendant upon relative chaos in labor-management relations outweighs the infringement on speech, the Wisconsin Court concluded that speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to representatives of the majority bargaining unit.

As justification for the constitutionality of the "exclusive bargaining representative" provisions in Wisconsin's MERA, the Wisconsin Court's reasoning may or may not be sufficient. The constitutionality of those provisions *per se* is not at issue in the present case.[3] The Wisconsin Court apparently conceived that it had met its duty by reaffirming its belief that the "exclusive bargaining representative" provisions are themselves constitutional. The Wisconsin Court apparently believed that no further constitutional questions remained. However, the constitutional implications of the present case are two-fold. The premise that negotiating in the traditional collective bargaining context can constitutionally be restricted to the exclusive representative does not support, in law or in logic, the conclusion that any context in which a public employer and his employees may happen to discuss wages, hours, and working conditions can constitutionally be defined as a collective bargaining context.

The context in which negotiation occurs apparently did not pose a constitutional question to the Wisconsin Court. According to the Wisconsin Court it is only necessary to determine whether conversations in a given case can be described as negotiation; if they can be so described then they can be restricted to the exclusive bargaining representative. The Wisconsin Court therefore concluded that the attendant infringement on speech is constitutionally permissible because it is constitutionally permissible to restrict negotiations to the exclusive representative. The net effect of the Wisconsin Court's decision is that all speech between a public employer and a public employee which can be characterized as negotiation, regardless of the context in which the speech occurs, is in derogation of the principle of exclusivity and can therefore be prohibited.

[3]The Chamber of Commerce submits that the Wisconsin Court's reasoning is more akin to the "rational basis" test than it is to the "clear, present, and immediate danger" test. If this is, in fact, the case, then the Wisconsin Court has failed even to justify the constitutionality of the "exclusive bargaining representative" provisions themselves since those provisions clearly limit the exercise of First Amendment rights.

The Wisconsin Court's definition of negotiation and the Court's application of that definition to the public meeting of the School Board has the direct effect of abridging the First Amendment rights of the Board's teachers. In order to support such a result, there must be an independent showing that negotiation of the type proscribed by the Wisconsin Supreme Court will pose grave and immediate danger to the state's interest in collective bargaining if it is permitted to take place in the context of a public meeting of the School Board. Yet experience in the private sector collective bargaining context has shown that a narrower definition of negotiation can be tolerated and a more restricted view of collective bargaining can be taken without injuring the public's interest in collective bargaining in the private sector.

The National Labor Relations Act, 29 U.S.C. §151 *et seq.* (NLRA), which regulates, in part, the bargaining relationship between unions and employers in private industry, contains exclusive representation provisions which are similar to those found in Wisconsin's MERA. In addition, the NLRA, like Wisconsin's MERA, describes certain conduct which, if engaged in by an employer, constitutes a violation of these exclusive representation provisions, and the NLRA, like Wisconsin's MERA, authorizes certain sanctions for engaging in unlawful conduct. The conduct described and the sanctions

authorized by the NLRA are similar to the conduct described and the sanctions authorized by Wisconsin's MERA. However, in the public employment context, the particular context regulated by Wisconsin's MERA, employees have a constitutional right to speak to their employer (the government) and the constitutional right peaceably to assemble and to petition their employer (the government), and these constitutional rights can be limited or regulated only in grave circumstances or for compelling reasons. In the private employment context, the particular context regulated by the NLRA, employees do not have a constitutional right to speak to their employer, nor a constitutional right peaceably to assemble and to petition their employer. Whatever rights employees in the private sector may have to treat with their employer are conferred by statute.

One might therefore expect to find a stricter regulation of speech in the private collective bargaining context than in the public collective bargaining context. In any event, one would certainly *not* expect to find a more stringent regulation of speech in the public collective bargaining context. The National Labor Relations Board, which is initially responsible for applying its expertise to the interpretations of the NLRA, could define the term negotiate so as to prohibit an employer from entertaining the unsolicited views of his employees on matters being negotiated between the employer and the union representing his employees. Justification for such a definition might be found in the fact that employees in the private sector have only a statutory right to approach their employer on the matters of wages, hours, and working conditions, and the statute conferring that right contemplates that it will be exercised only through the employees' designated representative. Yet, not even the National Labor Relations Board has gone as far in restricting an employee's access to his employer as has the Wisconsin Employment Relations Commission.

In *Outboard Marine Corp.*, 143 NLRB No. 57 (1963), the employer and the union were negotiating over a wage

reopener in the collective bargaining agreement in effect between them. The parties reached agreement on the proposed wage package, but the employer refused to agree to a check-off clause requested by the union. The union representatives agreed to submit the package to the union membership for ratification, but without recommendation, since the union representatives had conditioned their recommendation on receiving the check-off clause to which the employer had refused to agree. The membership rejected the wage package and the union representatives notified the employer to this effect, asking that the wage increases not be implemented.

Thereafter, a group of employees in the unit circulated among their fellow workers a petition to their employer which expressed their desire to accept the employer's wage package. Management officials had heard rumors that the petition was being circulated. In fact, the local union president had told the director of industrial relations about the petition. In due course, the employees presented their petition to their employer and the employer received it. The employer then posted a notice stating that he had received the employees' petition which expressed their desire to accept the wage increase and stating the employer's opinion that the union was not acting in the best interests of the employees when it failed to ratify the agreement. Thereafter the employer notified the union of his intention to put the wage increase into effect on a stated date, but added that his actions should not be interpreted as restricting any further negotiations. The employer then posted another notice to his employees in which he announced the wage increase.

On charges filed by the union that the employer had engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the NLRA, the Board held that the employer had not refused to bargain with the union and had not interfered with, restrained, or coerced his employees in the exercise of their right to bargain collectively through their exclusive representative. The Board found that the employer, simply by receiving the petition from his employees and posting a notice to that effect, had

neither expressed nor implied any desire to deal directly with his employees. In fact, when the employer had decided on his course of action with respect to the wage increase, he did not thereafter deal directly with the employees who had submitted the petition. Instead, the employer dealt with the union by giving them formal notice of his proposal to put the wage increase into effect, but inviting them to continue their negotiations with him.

Other National Labor Relations Board decisions, though not as directly on point as *Outboard Marine*, have nonetheless recognized the very practical fact that individuals feel the need to speak to their employees outside the formal boundaries of the bargaining unit and employers feel the need to have personal contact with their employees without using the sometimes impersonal conduit of the exclusive representative. Accordingly, in its decisions, the Board has allowed some latitude for this kind of exchange, even though the subjects discussed may be matters which the employer and the union are negotiating.

In *American Printing Company*, 173 NLRB No. 17 (1968), a group of pressmen sent their employer a letter advising him that they would not work on the following day unless the pressmen and the employer could come to an agreement which was better than the one which had been negotiated between the employer and the union. The employer went to the pressroom without a union representative being present and met with the pressmen. The employer told the pressmen that he could not meet their demands, and he told them to be reasonable. The employer then tried to draw them out in conversation to determine what they would be willing to accept in order to remain on the job. However, the employer made no specific proposals. The Board found that the employer neither attempted to induce employees in the union's certified unit to bargain with him directly nor engaged in direct bargaining with the employees. The Board therefore concluded that the employer had not violated Section 8(a)(5) of the NLRA by refusing to bargain with the union.

In *PPG Industries, Inc.*, 172 NLRB No. 61 (1968), the employer sent a letter to his employees and their wives in which he outlined his proposals for modification of the existing contract. One of the proposals he stated in the letter was a wage increase. The employer also expressed in his letter his regret that the union membership had rejected his proposals, and he assured his employees that he was ready to discuss problems with them at any time. The Board found that the employer's letter was not an attempt to denigrate the union or to undermine its authority. The Board therefore concluded that the employer had not interfered with, restrained, or coerced his employees in the exercise of their right to bargain collectively through their exclusive representative.

In *Tobasco Prestressed Concrete Co.*, 177 NLRB No. 101 (1969), two employees told their employer that they were curious about the employer's proposed health and welfare plan, which had been a stumbling block in contract negotiations with the union. The employer invited the two employees to meet with the representative of the insurance company which was to provide the plan. The employees were shown the proposed plan. The employer gave one of the employees a copy of the plan and asked him his opinion of the plan. The Board found that the employer had merely discussed the plan with the two employees, and the Board concluded that this did not constitute bargaining in derogation of the union which represented the employees.

In *Stokely-Van Camp, Inc.*, 186 NLRB No. 64 (1970), the employer, during contract negotiations, conducted three employee meetings for the purpose of explaining contract proposals which had been rejected by the union membership. No employees were required to attend the meetings. At the start of each meeting the employer made it clear that the meeting was not a negotiating meeting but was called in order to clarify any misunderstanding and to answer any questions the employees might have concerning the proposals. Questions were in fact raised and were answered. However, there was no attempt to

bargain with the employees, no promises were made to the employees, and no questions were asked about their contract desires. The union contended that the employer had attempted to undermine and bypass the union as the bargaining agent by persuading employees to exert pressure on the union to accept the employer's contract proposals. The Board rejected the union's argument and concluded that the employer had not violated the NLRA by refusing to bargain with the union.

The Chamber of Commerce is aware, of course, that decisions of the National Labor Relations Board are not binding on this Court, and they are not determinative in this case; nor are the Board's decisions offered as precedent. Nevertheless, these decisions are instructive because they demonstrate a delicate understanding of human needs and human behavior in a particular collective bargaining context where no such understanding is constitutionally mandated. Moreover, they establish beyond question that broader limits on speech and narrower limits on exclusive representation than those struck by the Wisconsin Supreme Court can be permitted without doing grave and immediate harm to the public policy which favors collective bargaining in private employment. To put it more precisely, the term "negotiate" can be defined more narrowly than the Wisconsin Supreme Court has defined it and the collective bargaining context can be more limited than the Wisconsin Supreme Court has found it to be without bringing down about our ears the whole framework of collective bargaining.

This is also precisely where the Wisconsin Supreme Court has erred, and erred grievously. The Wisconsin Court has ignored this Court's well-reasoned admonition that, where possible, statutes should be construed narrowly so as to avoid collisions with First Amendment rights. *Schneider v. Smith,* 390 U.S. 17 (1968). Instead of construing more narrowly the statutory right of the union in this case to be the exclusive representative of the teachers in the unit, the Wisconsin Court broadly infringed the First Amendment rights of the teachers to speak, assemble,

and petition. Had the Wisconsin Court heeded this Court's admonition and had it sought the expertise of others, such as the National Labor Relations Board, who have had to make similar decisions, it might have avoided its harsh and unsupportable result.

CONCLUSION

For the reasons set forth above, and those in the Appellants brief, it is respectfully requested that the judgment of the Supreme Court of the State of Wisconsin be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED,

Appellees.

On Appeal from the Supreme Court of the State of Wisconsin

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED,

Appellees.

On Appeal from the Supreme Court of the State of Wisconsin

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE.

The American Association of University Professors appears *amicus curiae,* with consent of all parties.

INTEREST OF AMICUS CURIAE

The American Association of University Professors (AAUP) was founded in 1915 to advance the standards, ideals and welfare of teachers and research scholars in universities and colleges. Since its inception

the Association has formulated Statements, frequently in concert with other national organizations, intended to establish minimum standards of institutional practice in higher education. Paramount among these is the 1940 *Statement of Principles on Academic Freedom and Tenure* (1940 *Statement*), drafted jointly with the Association of American Colleges and currently endorsed by almost 100 educational organizations and learned societies. To a large extent, Association standards are recognized and relied on by faculties, administrations, and governing boards in institutions of higher education.

In its 1972 *Statement on Collective Bargaining,* the Association recognized collective bargaining as an effective means to supplement its basic programs, including the advancement of academic freedom. Since 1972 the Association has provided assistance in collective bargaining on a selective basis to interested local chapters of the Association at particular colleges and universities. As of March, 1976, the Association included 75,086 members in 1,372 chapters; approximately 20,000 faculty represented by 40 Association chapters participate in collective bargaining in both the public and private sector.

The decision by the Supreme Court of Wisconsin in the instant case implicates the First Amendment rights of all public employees engaged in collective bargaining, including teachers and research scholars at public universities. Accordingly, as an organization deeply committed to the civil liberties of teachers and research scholars, and which has affiliated chapters engaged in collective bargaining, the Association believes it is uniquely situated to address this Court as *amicus curiae* in the present litigation.

STATEMENT OF CASE

Appellant board of education (hereinafter "board") and Appellee Madison Teachers, Inc. (hereinafter "MTI") were parties to a collective bargaining agreement which terminated on December 31, 1971. On January 25, 1971, during negotiations for a successor agreement, MTI proposed a contractual requirement that non-member teachers pay full union dues. This "fair share" proposal was repeatedly rejected by the board throughout the year.

By December 6, 1971, the date of the Board's regular public meeting, the board and the MTI had reached an impasse in their negotiations. The MTI had arranged to have pickets present and 300-400 teachers in attendance at the auditorium during the meeting. A portion of the board meeting was devoted to expressions of opinion by the general public. During this period, several citizens spoke, including the union representative, who expressed his approval of the fair share proposal and concluded his remarks by presenting a statement, signed by 1,300-1,400 teachers, urging a resumption of negotiations and an early agreement.

An individual teacher spoke immediately following the union representative. He read a petition, which requested a one-year deferral of consideration of the fair share issue, and proposed the following:

> 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair share proposal. 4) The results of this written ballot be made public.

After reading the petition, the speaker noted that 417 teachers had signed it. He also stressed that the petition did not advocate a position on the fair share proposal, but only called for clarification and communication. Except for a question from the board president asking whether he intended to "communicate" the petition to the board, there was no other exchange between the teacher and any member of the board.

MTI filed a complaint with the Wisconsin Employment Relations Commission (hereinafter "WERC") claiming that the board, by permitting the teacher to speak at this regularly scheduled and otherwise public meeting, had committed a "prohibited practice" under Wisconsin Statute § 11.70 (3)(a) 1 and 4. WERC ordered the board to

> . . . immediately cease and desist from permitting employees other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining. . . .

The board argued before the state courts that the WERC order requiring it to forbid teachers who are also citizens from speaking at an open, public meeting forced it to violate the First and Fourteenth Amendments to the United States Constitution. Nevertheless, this order was upheld by the Supreme Court of Wisconsin.

SUMMARY OF ARGUMENT

As interpreted and as applied by the state supreme court, Wisconsin statute § 11.70(3)(a) 1 and 4 violates the First and Fourteenth Amendments to the United States Constitution:

1. The statute denies certain teachers the right to present their views on school affairs in the course of a regularly scheduled public meeting of the school board held for the express purpose of eliciting citizen comment on those affairs. In this respect, the statute abridges their freedom of speech and of petition as citizens;

2. The statute impermissibly discriminates against certain teachers by selectively excluding them from participating in a public forum in which all others are free to be heard. In this respect, the statute denies to them the equal protection of the law.

ARGUMENT

As Interpreted and as Applied by the State Supreme Court, Wisconsin Statute § 11.70(3)(a)1 and 4 Violates the First and Fourteenth Amendments to the United States Constitution.

This Court is bound to rule against the constitutionality of Wisconsin statute § 11.70(3)(a) 1 and 4 because of the unfortunate interpretation given to that statute by the state's highest court. As interpreted, that statute requires a public school board to prevent certain persons even from addressing it in an open and public meeting. As applied, the statute flatly forbids any statement or petition by a particular class of teachers, regardless of the truth, the relevance, or the unexceptionable manner of their proposed presentation. The statute forbids them to speak, moreover, although the school board is required in the course of the same public meeting to hear from others who seek action by that board which those forbidden to speak may believe to be injurious to the public interest as well as to their own interests as teachers, citizens, parents, and taxpayers. The statutory prohibition upon their equal freedom of speech and of petition operates, finally, even supposing that what they wish to say or to submit may

not otherwise be offered by any other person and may, moreover, be based on information and experience that others will not have shared.

The basis of the state court's extraordinary decision is that court's understanding of the "exclusivity" principle enacted by § 11.70(3)(a) 1 and 4. As applied by the state court, the "exclusivity" principle overrides the First and Fourteenth Amendments to enable a state to regulate the public meetings of governmental bodies for the express purpose of supressing the impact of dissent. Insofar as a given individual is employed by a school in which a majority of the teachers have chosen to be represented by a union, those persons not choosing to become members of that union are nonetheless stripped of their right to appear as any other citizen and to speak at an open public meeting, without consent of the union spokesperson. *Amicus* AAUP believes that any statute, so construed and so applied, clearly denies equal protection of First Amendment rights. We respectfully join in urging this Court to reverse.

Our argument can be very briefly summarized. All persons, including teachers, are entitled to the equal protection of the First Amendment when they ask merely to speak on matters of general interest under consideration in a public meeting conducted by a government body with power to dispose of these matters. The fact that the matters under public review may be particularly important to them professionally, and the fact that the view they would offer might itself be in disagreement with the view offered by others who are also affected professionally, cannot possibly state a just reason for suppressing their equal right to be heard. Rather, the purposes of the First Amendment are themselves subverted when the only persons denied

their freedom of speech are the very persons most likely to offer information and views not otherwise as likely to be brought to public attention by those who are allowed to speak. The irony of this case is, above all, that those most likely to contribute to that diversity of views it was the very function of the required public meeting of the school board to elicit were the very persons *exclusively* forbidden to do so.

The importance of affording individual teachers equal protection to venture dissent, most especially on school matters of public importance, has been fully appreciated by this Court in *Pickering* v. *Board of Education,* 391 U.S. 563, 572 (1968):

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions.

There is in this case no suggestion that the teachers denied that opportunity by the state supreme court's statutory interpretation had "waived" their rights to attend or to participate in the scheduled public meeting on equal terms with the freedom of others to do so —no basis at all for any conclusion that they had sought the advantages of union membership in exchange for an enforceable personal agreement that, whatever their personal and professional views on whatever the union might propose, they would agree to suppress these views in exchange for the collective benefits of that membership. It is accordingly unnecessary for this Court to decide whether such a waiver, were it permitted by Wisconsin law, might itself raise a substantial federal question. Rather, the state supreme court

held that the state itself could and did forbid them to speak and to address the questions then in public controversy, literally and solely as an involuntary condition of their public employment. Thus, the decision specifically directed the school board not to permit "employes, other than representatives of Madison Teachers Inc., to appear and speak." 69 Wis. 2d at 209, 231 N.W.2d at 211. Clearly this is not tolerable, consistent with what this Court has declared in *Pickering* (*supra* at p. 568):

> [Insofar as the state supreme court's opinion] may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.

The State of Wisconsin has, by statute, committed itself to the proposition that there is a sufficient public interest in the consequences of its labor relations with public teachers that no binding agreement is to be made absent a fair opportunity for public discussion and review before the authoritative government body, meeting in regular open session. The forum which the state itself provided is the very forum most sheltered of all by the First Amendment, and least defensible of all in which to tolerate the selective exclusion of persons merely wishing to express their view that the school board should conduct further study before adopting a proposal that would determine the welfare of the public schools.

This is not a case where the forum was a peculiar or nontraditional one, as the curtilage of a jail, the anteroom of a library, or the captured audience of a public bus. (*See, e.g., Lehman* v. *City of Shaker Heights,* 418 U.S. 298 [1974] and cases cited therein.) It is, rather, a case in which the state has elected to provide this forum for citizen review of pending public business while simultaneously discriminating among those who may be heard. Even in the most recent utterances by this Court, dealing with the most sensitive kind of forum (*i.e.,* a military base), it has been made emphatically clear that such a practice offends the Equal Protection Clause and the First Amendment. *Greer* v. *Spock,* 44 U.S.L.W. 4380 (1976). *See also Police Department* v. *Mosley,* 408 U.S. 92 (1972) and cases cited therein; Karst, *Equality as a Central Principle in the First Amendment,* 43 U. Chi. L. Rev. 20 (1976).

The sole justification for this discriminatory treatment of dissenting teachers is found in the state court's suggestion that it was necessary for labor peace: *i.e.,* that unless the designated union representative were allowed exclusive authority to ration what would be said by any teacher in the course of the public hearing, the impact of what might be heard might not only weaken the force of the union's own unilateral presentation but also serve to demoralize the confidence of its members. As a national association whose local affiliates engage in collective bargaining, the American Association of University Professors shares the anxiety that open public review, prerequisite to a government agency agreeing to specific collective bargaining terms, does present such hazards and may not itself be constitutionally required. In spite of the fact that the subjects of bargaining in the public sector (permissive as well as mandatory) may range very wide and may well involve public interests, making it legitimate for

a state to require such a general hearing before an agreement is settled, we are not arguing that such a procedure is required of any state. This case does not present that issue and does not require this Court to say anything about it.

Nevertheless, we know of no constitutional restriction which forbids a state to require, as Wisconsin has in this case, a public meeting open for the very purpose of ventilating public issues involved in public sector collective bargaining as a means of democratic restraint to be observed before any final agreement is entered into. *And when that step is taken, we are clear that the First and Fourteenth Amendments forbid the selective exclusion of any person, least of all a teacher who may himself be affected by the outcome, from an equal right to be heard.* In this setting, the expedient good of labor peace must yield to the ultimate good better reached by free trade in ideas. As Mr. Justice Holmes put it:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.
>
> *Abrams* v. *United States*, 250 U.S. 616, 624 (1919) (dissenting opinion)

We would also note that reversal of the decision below, limited in the manner we suggest, raises no serious questions respecting collective bargaining practices in either the private or public sectors. Indeed, the state court's interpretation of state law (requiring the discriminatory suppression of some teachers) was originally believed to be unnecessary and improper by the Wisconsin labor board (WERC). In a previous case, that board had determined that the *denial* of the right of individual teachers to speak at a public meeting of a mere school committee (much less a scheduled regular meeting of the school board), far from being required by the Wisconsin statute, was itself an unfair labor practice. That determination was reversed by the state supreme court in *Board of School Directors* v. *WERC*, 42 Wis. 2d 637, 168 N.W.2d 92 (1969). We are unaware of any decision in any other jurisdiction in agreement with the current Wisconsin decision on facts at all similar to those now before this Court.

Moreover, the interpretation of the Wisconsin statute is *not* favored by analogy to judicial and National Labor Relations Board decisions respecting federal labor law applicable to the private sector. In *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944), the only case cited by the state supreme court which involves the "exclusivity" principle, the employer "induced" some of its employees to abandon the exclusive bargaining agent by granting them wage increases. The inducement occurred during "direct negotiation" at a private "conference" between the company manager and the dissident employees. This Court found that the employer violated his duty to bargain exclusively with the duly designated bargaining agent. None of the factors which led this Court to find an un-

fair labor practice in *Medo* are present if school employees who are not representatives of the exclusive bargaining agent "appear and speak . . . on matters subject to collective bargaining" at an open meeting of a public school board.

The District Court in *Local 858, AFT* v. *School District No. 1,* 314 F. Supp. 1069, 1075, 1076 (D. Colo. 1970), sustained exclusive union use of "only those internal channels of school communication which are not traditionally of a public nature," and only when no "normal means of communication" were impaired. This Court's decision in *NLRB* v. *Magnavox Co.,* 415 U.S. 322, 325 (1973), which held that "the place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees," seems to reject the balance struck in *Local 858* between the exclusive privileges of the majority union and the access of dissident employees to internal channels of communication. The fact that this Court in *Magnavox* afforded additional latitude for "the dissemination of views," however, only emphasizes the speech-protective aspects of *Local 858.*

Finally, numerous NLRB decisions hold that the mere statement of opinion or argument for a position by an employee in the presence of an employer does not violate the "exclusivity" principle. For example, in *Coast Radio Broadcasting Corp.,* 151 N.L.R.B. No. 117, 58 L.R.R.M. 1574 (1965), the NLRB held that it is not an unfair labor practice even for a private employer to receive unsolicited proposals and for management representatives to meet with dissident employees while remaining noncommittal. Cf. *American Printing Co.,* 173 N.L.R.B. No. 17, 69 L.R.R.M. 1238 (1968).

CONCLUSION

For the reasons outlined in this brief, *amicus curiae* respectfully urges that the judgment of the Supreme Court of Wisconsin be reversed.

Respectfully submitted,

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IN THE

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October Term, 1976

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8,

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On Appeal from the Supreme Court
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BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

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BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

INTEREST OF AMICUS*

The National Education Association (NEA) is the largest teacher organization in the United States, with a membership of approximately 1.7 million educators, most of whom are teachers in public educational institutions.

* The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

Many NEA members and affiliates are entitled to engage in collective bargaining with their employer school boards. The appellee in this case, Madison Teachers, Inc., is an NEA affiliate. It has been selected pursuant to Wisconsin law as exclusive bargaining representative of the teaching personnel employed by appellant City of Madison Joint School District No. 8.

The NEA frequently participates as *amicus curiae* in cases involving the rights of teachers and the interests of NEA affiliates. This brief is filed to present the view of *amicus* that there is no conflict between the First Amendment and the principle of exclusive bargaining in this case and that it is unnecessary for this Court to decide which would prevail if a conflict ever should develop.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the Wisconsin Supreme Court in this case represents an accommodation between the policies reflected in two state statutes. One is the Municipal Employment Relations Act, which requires municipal employers, including school boards, to bargain collectively with—and only with—the representatives selected by the majority of their employees, on the subjects of wages, hours, and conditions of employment.[1] The other is the Wisconsin Anti-Secrecy Act, which provides that no formal government action of any kind shall be introduced, deliberated upon, or adopted at a closed meeting.[2] The accommodation that

[1] Wis. Stat. § 111.70 (1974).

[2] After an initial declaration of policy the Act states:

> "Except as provided in sub.(4), all meetings of governmental bodies shall be open sessions. No discussion of any matter shall be held and no action of any kind, formal or informal, shall be introduced, deliberated upon, or adopted by a governmental body in closed session, except as provided in sub.(4).

Wis. Stat. § 66.77(3) (Supp. 1975). One of the exceptions in subparagraph (4) allows closed sessions for, *inter alia*, discussion of the employment or compensation of any public employee. *Id.* § 66.77(4)(b). Another allows closed sessions for

> "Deliberating or negotiating on the purchasing of public property, the investing of public funds, or conducting other public business which for competitive or bargaining reasons require closed sessions."

Id. § 66.77(4)(d).

the Wisconsin court adopted in this case is challenged on the ground that it abridges the First Amendment rights of certain employees.

The Wisconsin court's first decision on these two statutes was *Board of School Directors* v. *Wisconsin Employment Relations Commission*, 42 Wis. 2d 637, 168 N.W.2d 92 (1969). In that case the court held that the Anti-Secrecy Act applied to the process of collective bargaining between a municipal employer and the representative of its employees. Although the court approved an interpretation that allowed negotiations to occur in private session, it held that the school board cannot take final action on the bargaining proposals *"until they are made public and discussed in an open public meeting."* *Id.* at 653, 168 N.W.2d at 100 (emphasis in original). In the same case the court decided that a representative of a minority union was not entitled at such a meeting to make a statement on the subjects of collective bargaining, even though other members of the public were allowed to speak. Because the meeting constituted the final step in the bargaining process, the court held that allowing the minority representative to participate would be inconsistent with the policies underlying the state's exclusive bargaining principle.

The same statutory problem recurred in the instant case. At the culmination of a 10-month negotiation process the School Board held a meeting and opened the floor for comment on the collective bargaining proposals. The president of the majority union made a statement on its behalf and

presented a petition signed by 1300 or 1400 teachers, urging the Board and the Union to resume negotiations and reach an agreement. App. 105. Over the union's objections the Board also allowed a teacher, Albert Holmquist, to make a statement on behalf of an *ad hoc* minority group urging rejection of one of the union's proposals. App. 104-06. The Wisconsin Supreme Court found that the meeting in question was "the necessary and final step in the 'negotiation' process between the school board and the majority teachers' union." App. 112. Under these circumstances, the court held, the Board violated the statutory principle of exclusive recognition by allowing Holmquist to participate in the negotiation process.

Neither the Wisconsin court's interpretation of the state statutes nor its decision that the meeting in this case was part of the negotiation process is open for question here.[3] The only issue presented by this appeal is whether that accommodation of the two statutes, which requires the school board to hold a public meeting as a part of the negotiation process, and prohibits participation by employees other than representatives of the majority union, violates the constitutional rights of those employees who may wish to make a statement at that meeting as individuals or on behalf of a minority faction.

In Part I of this brief, we will show that the First Amendment does not guarantee access to the podium at a particular school board meeting. The restricted access prescribed by the Wisconsin Supreme Court in this case is reasonable in light of the policy behind the required meeting and the State's strong interest in assuring stable labor relations in municipal employment.

In Part II of this brief, we suggest that it is unnecessary

[3] *E.g., Hortonville Joint School Dist. No. 1* v. *Hortonville Education Association,* 44 U.S.L.W. 4864, 4866 (June 17, 1976); *Groppi* v. *Wisconsin,* 400 U.S. 505, 507 (1971).

on this appeal for the Court to grapple with the broader constitutional questions raised by the order of the Wisconsin Employment Relations Commission.

I. THE FIRST AMENDMENT DOES NOT GUARANTEE ACCESS TO THE PODIUM FOR INDIVIDUAL EMPLOYEES AND MINORITY REPRESENTATIVES AT A SCHOOL BOARD MEETING THAT IS PART OF THE COLLECTIVE BARGAINING PROCESS.

The State of Wisconsin has chosen a common theme for its Municipal Employment Relations Act. Employees are guaranteed the right to choose a labor organization to represent them in negotiations with their employer. The employer in turn must negotiate with an organization chosen by a majority, and it may not negotiate with any other group or individual. This principle of exclusive recognition not only enables the employees to present a united front on questions of wages, hours, and working conditions, but it also protects the municipal employer from the competing demands of splinter groups and the administrative burdens of dealing with more than one bargaining agent. It was the judgment of the Wisconsin legislature that this system would "encourage voluntary settlement" of labor disputes, Wis. Stat. §111.70(6), and that it would allow the municipal employer "to act for the government and good order of the municipality . . . [and] to assure orderly operations and functions within its jurisdiction," *id.* §111.70(1)(d).

The other provision of Wisconsin law crucial to this case is the declaration in the Anti-Secrecy Act that "the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business." Wis. Stat. §66.77(1). Together the two statutes require an open meeting at the culmination of the collective bargaining process, at which, under the Anti-Secrecy Act the public may be invited to comment on the bargaining proposals but, under the Employment Relations

Act, no employee may be allowed to participate except as the authorized spokesman for the majority union. The School Board contends in this case that it will violate the First Amendment rights of its employees if it is required to limit participation in this manner.

The state laws involved here, as interpreted by the Wisconsin Supreme Court, do not violate the First Amendment. These laws do not touch the right of a speaker to gather an audience around him in an appropriate public place and express his views to those who are willing to listen. The issue instead is whether there is a right to address a public body, a school board, which has convened a meeting for the purpose of conducting government business.

In a public place that is traditionally open for free expression, such as a street or a park, the State "may not select which issues are worth discussing or debating." *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92, 96 (1972). It may not exclude certain speakers on the basis of their identity or their views. *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953); *Niemotko* v. *Maryland,* 340 U.S. 268 (1951). And it cannot make decisions based upon the government's view of the relative value of what different speakers have to say. *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975). In such places the State may only make "reasonable time, place, and manner regulations applicable to all speech irrespective of content." *Id.* at 209.

This Court has recognized that all of these rules cannot apply to every occasion and every medium that may lend itself to expressive conduct. The Court has held repeatedly that First Amendment standards depend upon the nature and the use of the place and the medium for which the right of access is claimed. *E.g., Greer* v. *Spock,* 44 U.S.L.W. 4380 (Mar. 24, 1976); *Hudgens* v. *NLRB,* 44 U.S.L.W. 4281, 4285 (Mar. 3, 1976); *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 557 (1975); *Police Department of*

the City of Chicago v. *Mosley, supra; Grayned* v. *City of Rockford,* 408 U.S. 104, 116 (1972); compare *Adderley* v. *Florida,* 385 U.S. 39 (1966), and *Cox* v. *Louisiana,* 379 U.S. 559 (1965), with *Edwards* v. *South Carolina,* 372 U.S. 229 (1963). *See also Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 44 U.S.L.W. 4686, 4693 n.24 (May 24, 1976).

In *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974), eight members of this Court agreed that in deciding whether the First Amendment guarantees a right of access to a particular place, the Court must assess the nature of the forum, the interests of the speaker and his audience, and the legitimate interests of the public that would be compromised if access for free speech were allowed.[4] If this analysis leads to the conclusion that the place is not a public forum, the state is free to make distinctions among speakers as long as they are reasonable. *See Greer* v. *Spock, supra,* at 4383-84; *Lehman* v. *City of Shaker Heights, supra,* at 303-04 (plurality opinion). In this case there is no public forum and the grounds for the exclusion are reasonable.

The primary purpose of a school board is to run the schools. The time that school board members can spend in public meetings is necessarily limited, and the public interest would not be served by a rule that the board must listen

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[4] The plurality opinion stressed "the nature of the forum and the conflicting interests involved," 418 U.S. at 302, but it took into consideration each of the elements of the formula suggested by the dissent:

> "[T]he Court must assess the importance of the primary use to which the public property or facility is committed and the extent to which that use will be disrupted if access for free expression is permitted."

Id. at 312. The plurality and the dissent thus agreed on the general principle, although they disagreed over its application on the facts of that case.

to everyone who wants to speak.[5] The efficient transaction of government business demands the flexibility to devote the limited time to speakers who can make valuable contributions to the issues at hand. The problems in this regard parallel those of the microwave spectrum, whose physical limitations have led this Court to conclude that there is no First Amendment right to occupy a radio or television channel. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 101-02 (1973); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 389 (1969); *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 226-27 (1943). As the Court said in *Red Lion, supra,* at 388, and repeated in *Columbia Broadcasting System, supra,* at 101, "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." As long as the government acts under reasonable standards for choosing among applicants, it may grant or deny a broadcast license on considerations that are improper where First Amendment guarantees are fully applicable. *Red Lion, supra,* at 394; *National Broadcasting Co., supra,* at 226-27; *cf. Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974). It thus may require a licensee "to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community." *Red Lion, supra,* at 389; *see id.* at 394. It follows for the same reasons that a school board meeting is not a public forum and the First Amendment does not guarantee a right of access to the podium. Access may be subject to reasonable restrictions so

[5] Many cases of this stripe may end on the observation that the First Amendment does not include a right to require any other citizen to listen to a speaker's views. *Pell* v. *Procunier,* 417 U.S. 817, 821-22 (1974). On the peculiar facts of this case, however, the School Board insists that it would be a willing listener if the State did not forbid it to receive this particular message from this particular speaker at this time and place.

that school business can be conducted in an orderly manner and in the public interest.

Restrictions on subject matter are essential. If the school board invites members of the public to attend its meetings and comment on school business, the invitation does not convert the meeting into an open forum at which anyone may speak on any subject. *See Greer* v. *Spock, supra,* at 4383 n.10. No one would suggest that a school board must spend its meetings listening to speeches about deplorable conditions in the prisons. Or that if its present business is class size, it may not confine the agenda to that subject and refuse to hear those who wish to criticize the principal's use of corporal punishment. Without such restrictions on subject matter the school board could not open a meeting for public comment without losing control over its proceedings.

The board must also be able to make reasonable distinctions among potential speakers.[6] For example, if the issue is whether to consolidate two small schools, the board may want to hear only from the parents and teachers who would be affected by the change. On certain troublesome subjects it may want to get the views of experts, of community leaders, or of other responsible spokesmen without opening the floor to everyone else who would like to speak. On other subjects it may seek representative viewpoints. In a line-by-line debate over a proposed budget, for example, the board might want to have the PTA or some other organization speak for the parents rather than having every interested individual state his view on every item at issue.

In this case the restriction on participation at the school

[6] Of course, there are limits on the distinctions the board may draw. It could not discriminate on the basis of race, religion, political persuasion, or similar grounds. *Cf. Healy* v. *James,* 408 U.S. 169 (1972) (privileges of campus recognition could not be denied SDS because administration disapproved of its political ideas); *Niemotko* v. *Maryland, supra* (use of park could not be denied Jehovah's Witnesses when it was granted to other religious groups).

board meeting is based only on the status of the speaker. There is no distinction between one viewpoint and another. Members of the public may voice any opinion, and employees other than union representatives may not participate either to support or oppose the majority proposals.[7] *Cf. NLRB* v. *Draper Corp.*, 145 F.2d 199 (4th Cir. 1944). The only distinctions are between members of the public and employees, and, with respect to employees, between the designated bargaining agent and everyone else. The Wisconsin Supreme Court's decision that employees as such may not participate in this particular meeting is reasonable in light of the exclusive bargaining relationship between the school board and the majority union, and the role of this meeting in the bargaining process. That decision, though perhaps not the only possible response to the problem, should be respected. *See National League of Cities* v. *Usery*, 44 U.S.L.W. 4974 (June 24, 1976); *Hortonville*

[7] Although certain forms of content discrimination may be forbidden in this context, none is produced by the Wisconsin court's decision in this case. There is neither sympathy nor hostility to any particular point of view, *see Young* v. *American Mini Theatres, Inc.*, 44 U.S.L.W. 4999, 5004 (June 24, 1976) (plurality opinion), nor discrimination among persons similarly situated based upon their beliefs, *see Greer* v. *Spock, supra,* at 4383; *National Broadcasting Co., supra,* at 226. *Cf. Bonner-Lyons* v. *School Committee of the City of Boston,* 480 F.2d 442 (1st Cir. 1973) (parents' group against busing allowed to distribute statement through school facilities; proponents of busing unconstitutionally denied same privilege). For a contrast to the instant case, *see Smetanka* v. *Borough of Ambridge,* 378 F.Supp. 1366 (W.D. Pa. 1974). In that case the borough council passed a resolution to the effect that Mrs. Smetanka would no longer be allowed to speak at council meetings even though all other citizens were allowed to speak without limitation. The court found that Mrs. Smetanka had always conducted herself in an orderly fashion and had not posed any threat to the conduct of the council's business, but the council members had found her criticism annoying. The district court held that the selective exclusion violated the First Amendment.

Joint School Dist. No. 1 v. *Hortonville Education Association, supra,* at 4868.[8]

Under Wisconsin's chosen system for ordering municipal labor relations, the issues are worked out in negotiations between the school board and the organization selected by a majority of the employees. No other employee or organization is entitled to participate in this process, and the majority organization is required to represent the interests of all employees. The negotiations may extend over a period of months while the board and the union trade concessions and explore compromises. At the end of the process, when they have reached or are near tentative agreement, they must present the results to the public. The majority union, as a participant in the negotiations, has a legitimate part to

[8] Various briefs filed by *amici* in this case question the constitutionality of a state's decision to adopt the principle of exclusive bargaining for public employees. This case does not raise such broad issues, as the only question is whether the First Amendment invalidates the Wisconsin court's decision that a school board must restrict minority participation in a particular meeting. Nonetheless, it is curious that anyone would question the principle of majority rule in this context. The First Amendment guarantees no individual a right to bargain with government. Granting a representative of the majority a statutory right to bargain on behalf of all employees does not take away any individual's constitutional rights. Nor does it violate the Equal Protection Clause. The minority union that loses a representation election and the employee who voted for it stand in the same positions as an unsuccessful candidate for Congress and the voter who supported him: they retain their rights to comment generally on public affairs and to petition the Government, but neither suffers constitutional injury because the unsuccessful candidate is denied the privilege of speaking on the Senate floor.

This Court has sustained the principle of exclusive bargaining in private employment, *see J. I. Case Co.* v. *NLRB,* 321 U.S. 332 (1944); *NLRB* v *Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937); *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515 (1937); *Texas & N.O.R.R.* v. *Brotherhood of Ry. & Steamship Clerks,* 281 U.S. 548 (1930), and the principles that supported those rulings are equally applicable here. *See Railway Employes' Department* v. *Hanson,* 351 U.S. 225 (1956); *Local 858, American Federation of Teachers* v. *School District No. 1,* 314 F. Supp. 1069, 1075 (D. Colo. 1970).

play in presenting the total picture to the public. The school board may be unable adequately to explain the union's bargaining proposals to interested citizens. It may prefer to conduct the meeting as a debate, presenting its own side of the negotiations and leaving the union to explain the employee's side. Or it may simply want to be relieved of the burden of answering questions about the union's position.

Individual employees and minority factions occupy an entirely different position. They were not party to the negotiations. They have no part to play in describing the status of the negotiations to the public. Employees who support the union will simply restate what their elected representative has said. On the other hand, dissatisfied employees will attack the tentative agreement either because in their view the union made the wrong trade-offs and compromises or because it conceded too much to the school board. This is exactly what the state sought to avoid by adopting the principle of exclusive bargaining in the first place. Throughout the negotiations the school board is protected from conflicting demands and from the pressures of splinter groups. It is protected from the danger that minority factions will try to compete with each other by making unreasonable bargaining demands.[9] Under the state's chosen system, disputes among employees over their bargaining priorities should be ironed out at the beginning of the process, either at the point of choosing the majority representative or in the early stages of the negotiations. These disputes are to be resolved by majority vote so that the employees can speak with one voice and the school board can deal with them on that basis. *See NLRB* v. *Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969).

This system, in the state's judgment, was necessary to produce fruitful negotiations between the school board and

[9] Each of the two alternatives to exclusive bargaining poses the danger of irreconcilable demands upon the employer. "Members only" representation, "if taken seriously and carried out logically, would guarantee maximum instability in the employer-employee relationship. It would be chaotic and impracticable." D. Wollett & R. Chanin, The Law and Practice of Teacher Negotiations 2:14 (1970). Proportionate representation, in which each employee organization is given membership on a joint negotiating council in proportion to its support among the employees, has

> "inherent difficulties . . . which make it much more unstable than a system of exclusive representation by the majority organization. Each of the organizations on the council is caught in a competitive milieu where it must continuously strive to outdo the other organizations in order to hold present members and gain new ones. The minority organization has nothing to lose and everything to gain by taking militant and even irresponsible positions on salaries or personnel policies which it believes will have maximum membership appeal. The majority organization will be forced by considerations of survival to respond to this competition by being equally militant and irresponsible."

Id. at 2:15. The same danger is inherent whenever a minority faction is allowed to participate in the bargaining process.

the majority representative, to the ultimate end of reaching a voluntary agreement. If internal wrangling among employee factions is revived at the end of the bargaining process, at the point where the school board reports the results of the negotiations to the public, it will produce all the problems the state sought to avoid by insulating the earlier stages of the bargaining process, and it may have the additional effect of undermining the results of that process. The irresistible urge to respond to a face-to-face confrontation in an open meeting may lead to actual give-and-take bargaining between the school board and a minority spokesman. The state could conclude that as a class of cases such confrontations at a meeting that is part of the bargaining process would undermine the principle of exclusive bargaining.

Years of experience in the private sector have demonstrated that employers cannot manage their businesses efficiently if they must bargain with individual employees or minority factions as well as the majority representative. In *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50 (1975), this Court held that the protection given concerted activities by Section 7 of the National Labor Relations Act, 29 U.S.C. §157, did not pro-

tect two employees who tried to pressure their employer to negotiate with them rather than the majority representative about problems of racial discrimination. Despite the "highest priority" given to principles of nondiscrimination, 420 U.S. at 66, the Court's opinion emphasized that fragmentation of the bargaining unit on this issue would endanger the interests of both the employees and the employer, and that an employer could have "strong and legitimate objections to bargaining on several fronts over the implementation of the right to be free of discrimination." *Id.* at 70.

> "An employer confronted with bargaining demands from each of several minority groups would not necessarily, or even probably, be able to agree to remedial steps satisfactory to all at once. Competing claims on the employer's ability to accommodate each group's demands . . . could only set one group against the other even if it is not the employer's intention to divide and overcome them. . . . With each group able to enforce its conflicting demands—the incumbent employees by resort to contractual processes and the minority employees by economic coercion—the probability of strife and deadlock, is high . . . ."

Id. at 67-68.

For the same reason many public employers have adopted the principle of exclusive representation for their employees. The federal government initially experimented with recognition of minority unions under Executive Order 10988 (1962), but abandoned it in 1969 in favor of exclusive recognition for the majority representative. Executive Order 11491 (1969). One of the reasons for the change was that government agencies objected to their obligation to deal with minority unions.

> "Agency experience also has been largely on the negative side. Federal management officials have found that [minority] recognition is no longer meaningful;

> that it encourages fragmentation, creates overlapping relationships, and places an undue administrative burden on management; and that unions with such recognition lack the strength to contribute substantially to stable labor relations."

Study Committee Report and Recommendations, August 1969, Which Led to the Issuance of Executive Order 11491, at 65, in *Labor-Management Relations in the Federal Service* (U.S. Federal Labor Relations Council 1975).

A substantial majority of the states have followed suit in adopting exclusive recognition for their public employees. As of December 1974, thirty-nine states and the District of Columbia had decided either to allow or require exclusive bargaining for public employees. Of these, thirty states and the District of Columbia had exclusive bargaining for teachers.[10] This year at least one other state joined their ranks.[11]

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[10] These states are as follows:

Alabama (teachers), Ala. School Code, L. 1973, Acts No. 1022 and 1023; Alaska (all public employees), Alaska Stat. §§ 14.20.560(a), 23.40.100(b) (1972); California (local government employees, police, firefighters), West's Ann. Gov. Code § 3507 (1961); Connecticut (teachers, local, police, fire), Conn. Gen. Stat. Ann. §§ 7-471(1) (1965), 10-153b(d) (1969); Delaware (all public employees), Del. Code title 14 § 4004 (1970 Cum. Supp.), Del. Code title 19 § 1306 (1965 Supp.).

District of Columbia (teachers [history of de facto recognition] local, police, fire), Exec. Order No. 70-229, June 19, 1970, implemented by ch. 25A of District Personnel Manual; Florida (all public employees), Fla. Stat. § 447.009 (1974); Georgia (fire), Ga. Code Ann. § 54-1305 (1973 Supp.); Hawaii (all public employees), Hawaii Rev. Stat. § 89-8(a) (1970).

Idaho (teachers, fire), Idaho Code § 33-1273 (Cum. Supp. 1972) and § 44-1803 (Cum. Supp. 1970); Illinois (state), Exec. Order No. 6 (Sept. 4, 1973); Indiana (teachers, state, local), Burns Ind. Stat. Ann. § 28-4560(a)(1) (1973 Cum. Supp.), Ind. Code 22-6, §§ 1-13, Ch. 4; Iowa (all public employees), Iowa Acts 107, § 14.1 (1974); Kansas (all public employees), Kan. Stat. Ann. § 72-5415 (1972), § 75-4327 (1973 Cum. Supp.); Kentucky (fire), Ky. Rev. Stat. § 345.040 (1972).

Maine (all public employees), Me. Rev. Stat. Ann. § 967(2) (Cum.

Several court decisions also have noted that exclusive bargaining reduces interunion strife and protects the schools from conflicting demands. *Haukedahl* v. *School District*

Supp. 1973-1974), as amended, Me. Acts ch. 776, § 979-F (1974); Maryland (teachers), Ann. Code Md. Art. 77, § 160(e) (1969); Massachusetts (all public employees), Mass. Gen. Laws Ann. ch. 150E, § 4 (1973); Michigan (all public employees except those in state classified service), Mich. Stat. Ann. § 17.455 (1968).

Minnesota (all public employees except employees of charitable hospitals), Minn. Stat. Ann. §§ 179.63(6), 179.67 (1971); Missouri (state, local, fire), V.A.M.S. § 105.500(2) (1967); Montana (all public employees), Rev. Code Mont. 1947, §§ 59-1603(3) (1973); Nebraska (state, local, police, fire), Neb. Rev. Stat. § 48-838 (1947); Nevada (teachers, local, police, fire), Nev. Rev. Stat. § 288.160(2) (1969); New Hampshire (state, police), N.H. Rev. Stat. Ann. § 273-A:10(IV).

New Jersey (all public employees), N.J. Stat. Ann. § 34:13A-5.3 (1941); New Mexico (employees in state classified service), N.M. State Personnel Board regulations for the conduct of employee-management relations with classified state employees, § IV, as revised Jan. 31, 1975; New York (all public employees), N.Y. Civ. Serv. Law § 207 (1967); North Dakota (teachers), N.D. Cent. Code § 15-38.1-11 (1969); Oklahoma (teachers, local, police, fire), Okla. Stat. Ann. title 11, § 548.4(C)(1) (1974).

Oregon (all public employees), Ore. Rev. Stat. § 243.682 (1963); Pennsylvania (teachers, state, local, police, fire), Pa. Stat. Ann. title 43, § 1101.603 (1970), title 43, § 217.1 (1968); Rhode Island (teachers, state, local, police, fire), Gen. Laws of R.I., §§ 28-7-14 (1941); 28-9.1-5 (1961), 28-9.2-5 (1963), 28-9.3-3 (1966), 28-9.4-4 1967; South Dakota (all public employees), S. Dak. Comp. Laws 3-18-3 (1969); Texas (police, fire), Tex. Rev. Civ. Stat. Ann. art. 5154C-1, § 6 (1973); Vermont (teachers, state, local, police, fire), Vt. Stat. Ann. title 16, § 1991(a) (1969), title 27, § 941(h) (1969), title 22, § 1722(8) (1973).

Washington (teachers, state, local, police, fire), Rev. Code Wash. Ann. §§ 41.56.080 (1967), 28B.52.030 (1971), 28B.16.100 (1971), title 41, § 8 (1975); West Virginia (teachers, state, local, police, fire), Attorney General Opinions 6-29-62, 2-23-66, 6-26-74; Wisconsin (teachers, state, local, police, fire), Wis. Stat. §§ 111.70(4)(d)(1) (1974), 111.83 (1966); Wyoming (fire), Wyo. Stat. § 27-267 (1965).

The December 1974 compilation appears in *Government Employee Relations Report,* Reference File 51:501 et seq. (BNA 1975).

[11] *See* New Hampshire Rev. Stat. Ann. § 273-A:8 (as amended 1976).

No. 108, No. 75 C 3641 (N.D. Ill. May 19, 1976); *Edgewood Federation of Teachers Local No. 3158* v. *Edgewood Independent School District,* Civ. No. SA-74-CA-39 (W.D. Tex. May 7, 1975); *Federation of Delaware Teachers* v. *De La Warr Board of Education,* 335 F. Supp. 385 (D. Del. 1971); *American Federation of Teachers, Local 858* v. *School District No. 1,* 314 F. Supp. 1069 (D. Colo. 1970); *see also Sioux Falls Federation of Teachers* v. *Sioux Falls Independent School Dist.,* LM Dkt 2U, Mem. Dec. (S. Dak. Dept. of Labor, Mar. 24, 1976).

Finally, appellant's additional argument based on the First Amendment right to petition the government does not alter the analysis. Just as there is no First Amendment guarantee that "everyone with opinions or beliefs to express may address a group at any public place and at any time," *Cox* v. *Louisiana,* 379 U.S. 536, 554 (1965), the right to petition the government does not guarantee the right to address a particular meeting of a government body if prescribed procedures do not allow it. *See California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 515 (1972). The Wisconsin Employment Relations Commission expressly noted in this case that individual employees and minority factions could present their views to the school board by written petition, App. 165, and every other avenue of communication remains open to them. *Cf. Pell* v. *Procunier, supra,* at 823-24.

In the circumstances of this case, then, the Wisconsin Supreme Court's interpretation of the applicable statutes does not abridge the First Amendment rights of any employee. There is no guaranteed right to participate in school board meetings, and the distinction required by state law here is a reasonable means for the state to use in ordering its public employee labor relations. A state that places value on achieving stable labor relations through collective bargaining should not be held constitutionally required to pro-

vide a special forum to a minority faction for the purpose of undermining the bargaining process.

II. IT IS UNNECESSARY FOR THIS COURT TO ADDRESS THE BROADER QUESTION RAISED BY THE COMMISSION'S ORDER.

The circumstances of this case fully justify the state court's ruling that the School Board committed a prohibited practice by allowing Holmquist to make a statement at this particular meeting. But the Wisconsin court also affirmed the Commission's cease and desist order, which is considerably broader than the court's reasoning or the circumstances of this case. The order provides that the Board:

> "Shall immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc." App. 108.

By its terms, this order applies not only to public meetings that constitute the final step in the negotiation process, but to any public meeting, regardless of the subject matter.

It may be, in light of the more limited reasons given in support of both the Commission's and the court's decisions, that neither would interpret this order to apply to all school board meetings. Unless the order is narrowed, however, the School Board will have no choice but to comply with its terms and refuse at any meeting to accept statements on subjects of collective bargaining from employees other than the union representative. If the First Amendment requires equal access under any conceivable circumstances, this order would be unconstitutionally overbroad and would have the effect of denying legitimate opportunities to speak along with those that may properly be denied.

To decide whether the order is overbroad, however, would require this Court to speculate about the various circumstances under which employees other than the union representative would wish to discuss the subjects of collective bargaining at school board meetings, and to reach hypothetical judgments whether in all such circumstances the State's interest would justify requiring the employees to speak through the voice of the majority. It is not this Court's practice to decide such questions unnecessarily.

This Court on a number of occasions has remanded cases to state courts for clarification of their judgments.[12] This case is appropriate for that treatment, and we therefore suggest that the judgment below should be vacated and remanded to give the Wisconsin Supreme Court an opportunity to decide whether the order is restricted to the facts of this case, and thus to make it unnecessary for this Court to issue a possibly hypothetical ruling on the scope of the State's authority to regulate the agenda at public meetings.

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Supreme Court should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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[12] *E.g., Blackburn* v. *Alabama,* 354 U.S. 393 (1957); *Missouri ex rel. Southern Ry.* v. *Mayfield,* 340 U.S. 1 (1950); *Young* v. *Ragen,* 337 U.S. 235 (1949); *Standard Oil Co.* v. *Johnson,* 316 U.S. 481 (1942); *State Tax Commission* v. *Van Cott,* 306 U.S. 511 (1939); *cf. Minnesota* v. *National Tea Co.,* 309 U.S. 551 (1940); *Honeyman* v. *Hanan,* 300 U.S. 14 (1937).